In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PETITIONER,
v.
JOHN W. DICKINSON. } No. 362.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE AND THE QUESTIONS RAISED.

This is a criminal case involving the construction and application of the Constitution of the United States, of which the Circuit Court of Appeals for the First Circuit acquired jurisdiction on writ of error, reversed a judgment rendered upon a verdict of guilty against this respondent in the District Court for the District of Massachusetts, and remanded the case to that court for further proceedings. It is brought here for review on a writ of certiorari to the Circuit Court of Appeals issued on the petition of the United States under section 6 of the act of March 3, 1891 (26 Stat., 826, 828).

65361—08——1

The material language of the section referred to is familiar, and is as follows:

> The judgments or decrees of the circuit courts of appeals shall be final * * * in all cases arising * * * under the criminal laws * * *.
>
> In any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

The questions to be determined preliminary to a decision upon the merits of the controversy between the United States and this respondent are:

(1) Does the Government present a case within the class defined in *Forsyth* v. *Hammond* (166 U. S., 506, 514, 515), in *Fields* v. *United States* (205 U. S., 292, 296), and elsewhere? If so,

(2) Is the rule laid down in *Forsyth* v. *Hammond* (*supra*, at pp. 511 *et seq.*), determining the power of this court to review on certiorari the decisions of the circuit courts of appeal, inapplicable because this is a criminal case and the United States is the petitioner? If not,

(3) Does the fact that the judgment of the Circuit Court of Appeals did not dispose of the case, but

merely sent it back for a new trial, preclude this court from assuming jurisdiction over it?

In other words, and more concisely stated, Has this court power to review a criminal case on certiorari to a circuit court of appeals, at the suggestion of the Government, if the question involved is one of gravity and general importance, and the judgment of the Circuit Court of Appeals was, in effect, that a verdict of guilty be set aside and a new trial granted?

Although the question of power involved in this inquiry is more important than that of propriety, and although we are, perhaps, justified in assuming that the latter question, in the language of Mr. Justice Brewer in *Forsyth* v. *Hammond* (*supra*), is to be "considered as foreclosed by the action of the court in awarding the writ of certiorari," particularly as it was discussed at some length in our brief accompanying the petition for the writ, it seems to us important to a complete and intelligent presentation of the case to restate briefly, at the outset, the grounds upon which this court was asked to review it.

The only question upon which the case was decided adversely to the United States by the Circuit Court of Appeals is one of constitutional construction of great and general importance, as to which that court, upon a majority opinion, is in conflict with the Supreme Court of Massachusetts, with the law as

applied in practice in the courts of New Hampshire and Maine, in the same circuit, and, it is believed, generally throughout the United States in both federal and state courts. Briefly stated, the question is this:

If a defendant charged with an infamous crime, designated a misdemeanor by the statute creating it, is put upon trial in a federal court, and twelve duly qualified jurors are sworn to try the issue, and, the tribunal to which he is entitled by law having thus been constituted, his trial proceeds before it, and thereafter, during the progress of the trial, two of the jurors are incapacitated, and the defendant requests, and in writing over his own signature, consents that the case proceed to a verdict by the remaining jurors, and the Government assents, and a verdict of guilty is rendered, can he then have judgment against him arrested on the ground that he has been deprived of a constitutional right which he could not waive? or, as his counsel apparently prefer to put it, *on the ground that he has never been tried at all?*

All other questions raised by the defendant's assignment of errors in the Circuit Court of Appeals were answered by that court in favor of the Government, and counsel for the defendant have waived in this court all except the constitutional question already stated (assignments 53 and 54; Rec., p. 159); the question of the sufficiency of the indictment raised by the demurrer and additional demurrer (Rec., pp. 28, 32; assignments 1, 2, and 3, Rec., pp. 151, 152). These two, then (covered by assignments 1, 2, 3,

53, and 54), are the only questions involving the merits of the controversy which survive for argument in this court. They arose under the following circumstances:

The respondent, a depositor in the South Danvers National Bank, of Peabody, Massachusetts, and George M. Foster, the cashier of the bank, were jointly indicted in a single indictment in fifteen counts, covering fourteen separate transactions, at the December term, 1900, of the District Court for the District of Massachusetts, under section 5209 of the Revised Statutes, which is as follows, the portions applicable to this indictment being printed in italics:

> *Every* president, director, *cashier,* teller, clerk, or agent *of any association, who* embezzles, abstracts, or *willfully misapplies any of the moneys, funds, or credits of the association;* or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, *with intent,* in either case, *to injure or defraud the association* or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; *and*

> *every person who with like intent aids or abets any officer,* clerk, or agent *in any violation of this section, shall be deemed guilty of a misdemeanor,* and shall be imprisoned not less than five years nor more than ten.

The indictment charges, in substance, that in fourteen specific instances Foster, as cashier of the bank, with intent to defraud the bank, willfully misapplied its moneys, funds, and credits by unlawfully converting them to the use of Dickinson, this respondent, and that Dickinson aided and abetted him in such misapplication.

It was the contention of the Government at the trial, and the evidence introduced tended to show, that the misapplications charged in the indictment were made by unlawfully converting the funds of the bank through the payment by the bank, with the knowledge and by direction of Foster, of checks drawn by Dickinson when the latter had not on deposit a balance sufficient to meet the checks; that these checks were not entered in the ledger but were carried as cash in the drawer for a considerable period so that Dickinson's account on the ledger would not show an overdraft; that these overdrafts were covered by notes and renewal notes sent by Dickinson to the bank, where they were discounted and the proceeds credited to his account before the checks were charged on the ledger; that both Foster and Dickinson knew these notes to be worthless, and that they acted in concert with intent to defraud the bank.

After demurrers to the indictment had been overruled the defendants each pleaded not guilty and were put upon their trial January 7, 1902. The trial proceeded until January 28, 1902, when the case was taken from the jury because one of the jurors was found in contempt by reason of intoxication. A second trial was begun on January 14, 1903, before a jury of twelve, duly qualified and sworn, and progressed until January 27, 1903, when it was found that one of the jurors impaneled was unable to sit longer, owing to illness. The following stipulation, signed by each defendant *in propria persona*, was thereupon filed (Rec., p. 40):

> Whereas one of the jurors impanelled to try the above-entitled indictment is unable by reason of illness to further sit therein,
>
> Now, therefore, we consent and agree that the said juror, to wit, Charles F. Low, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining eleven jurors with the same force and effect as if said juror had not been discharged.
>
> JOHN W. DICKINSON.
> GEORGE M. FOSTER.
> THE UNITED STATES,
> By BOYD B. JONES,
> *Special Assistant U. S. Attorney.*

Upon the filing of this stipulation, the court proceeded with the trial before the eleven remaining jurors until March 18, 1903, when one of the eleven

asked to be excused from sitting further on account of the death of his father; and thereupon the following stipulation, also signed by the defendants in person, was filed (Rec., p. 40):

> Whereas one of the jurors impanelled to try the above-entitled indictment is unable, by reason of a death in his family, to further sit therein,
>
> Now, therefore, we consent and agree that the said juror, to wit, Edward E. Stockman, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining ten jurors with the same force and effect as if said juror had not been discharged.
>
> JOHN W. DICKINSON.
> GEORGE M. FOSTER.
> BOYD B. JONES,
> *Special Assistant U. S. Attorney.*

The court thereupon resumed the trial before the ten remaining jurors, and, on the second day following (March 20), they returned a verdict of guilty as to both defendants on the *first*, *third*, and *fifteenth counts*; a disagreement as to both on the fourth, fifth, eighth, ninth, and eleventh counts; and not guilty as to both on the second, sixth, seventh, tenth, twelfth, thirteenth, and fourteenth counts. (Rec., pp. 40, 41.) In both instances the stipulations filed were signed personally, as has been stated, by the defendants, after conferences participated in by the court, counsel for the Government, counsel for the defendants, and the defendants themselves, at whose request the trial proceeded, first with eleven and then

with ten jurors, to a verdict, the validity of which with respect to the number of jurors who returned it was not questioned until, at a subsequent term, more than two years later, namely, on March 23, 1905, other counsel having appeared for this respondent, a motion in arrest of judgment (Rec., p. 39) was filed in his behalf, alleging in substance that the verdict was unlawful because found by a jury of ten. This motion was overruled, a bill of exceptions allowed, and this respondent was sentenced, on August 10, 1906, to a term of nine years in jail. He thereupon sued out a separate writ of error from the Circuit Court of Appeals for the First Circuit, accompanied by a bill of exceptions, which raised questions as to (*a*) the sufficiency of the indictment, (*b*) the admissibility of certain evidence at the trial, and (*c*) the motion in arrest of judgment filed after the close of the term at which the verdict was rendered, and based upon the fact that the verdict was returned by a panel of ten jurors only.

With regard to the questions concerning the sufficiency of the indictment and the exclusion of evidence at the trial, the Circuit Court of Appeals, as already stated, found no error. As to the motion to arrest judgment, however, on the ground that the judgment was invalid because the verdict was rendered by ten jurors and not by twelve, a majority of the court (Putnam, circuit judge, and Brown, district judge) sustained the respondent's contentions (Rec., p. 164), reversed the judgment of the District Court, set aside the verdict therein, and remanded the case

for further proceedings in accordance with law. A dissenting opinion was rendered by Aldrich, district judge (Rec., p. 176), supporting the Government's claim that, upon the facts shown by the record, the judgment upon the verdict should stand. The United States thereupon made application for a stay of the mandate, which was granted, and brought the case to the attention of this court through a petition for certiorari.

The special reasons why certiorari should issue, all or most of which were stated upon our brief in support of the petition in this case, are:

(1) A constitutional question is involved, the importance and far-reaching effect of which can not easily be exaggerated. Here, for the first time in the history of constitutional construction, it is held by a majority of the Circuit Court of Appeals that the Constitution (Article III, section 2, and the Sixth Amendment) prescribes absolutely that a jury for the trial of all crimes must consist, from impaneling to verdict, of twelve men; that the panel can not be weakened by consent or waiver of the defendant; and that a verdict rendered by a panel which, originally twelve, has been reduced with the defendant's consent and at his request (Rec., p. 40) to less than that number, is unlawful. In other words, that there is a constitutional inhibition of any power on the part of a defendant to waive by express consent a verdict by a full jury.

(2) This specific question, it is conceded, has never been passed upon by this court.

(3) The occasion for the application of the principle contended for by the United States, due to the death, illness, or other incapacity of jurors impaneled, frequently arises in the trial of criminal cases, and the denial of that principle absolutely prevents the Government and a defendant from entering into a stipulation, even in the case of a misdemeanor, which would oftentimes save great expense to both parties and great loss of time to the court. The fact that there are no decisions upon this precise question in the federal courts and few in the state courts is to be regarded, we believe, not as elsewhere suggested by the respondent, as evidence of the infrequency of such incidents, but rather of the well-nigh universal practice generally accepted and acted upon by courts and the profession, arising from the settled belief that such a waiver is not violative of the provisions of the federal or state constitutions with respect to trial by jury in criminal cases.

(4) The majority opinion of the Circuit Court of Appeals is directly contrary to the law of Massachusetts as laid down by Chief Justice Shaw. (*Com.* v. *Dailey*, 12 Cush., 80; see Rec., p. 171.)

(5) It is at variance with the uniform practice in Massachusetts, Maine, and New Hampshire (Rec., p. 169), a practice which, it is believed, prevails generally throughout the United States.

(6) The question is vital to the case at bar, for, if the decision of the Circuit Court of Appeals stands, though not finally disposing of the case, it will almost inevitably preclude the possibility of another trial

because of lapse of time, and the death or absence of witnesses, and result in the escape of the defendant from the consequences of a serious offense of which, after a three months' trial, ten men, by whose decision he agreed to abide, have found him guilty.

(7) The trial consumed more than two months (Rec., pp. 37, 38), and another trial pursuant to the decree of the Circuit Court of Appeals, even if testimony sufficient to prove the charges in the indictment could now be produced, would needlessly involve great expense to the Government and inconvenience to the court, if the Circuit Court of Appeals erred in holding that there had been a mistrial, or no trial. See *American Construction Company* v. *Jacksonville, Tampa and Key West Railway Company* (148 U. S., 372, 384).

(8) It is also, perhaps, not unworthy of consideration that the decision of the majority of the Circuit Court of Appeals incidentally allows the defendant to profit by conduct which, measured by ordinary standards, was a deliberate breach of good faith on his part toward the court and toward the Government.

(9) Of the four judges who have already passed upon this question, two (Dodge and Aldrich, district judges) have upheld the contention of the Government. (Rec., pp. 41, 176.)

It is under these circumstances, and for these reasons, that the United States asks this court to assert and exercise jurisdiction over this case, to review the proceedings of the Circuit Court of Appeals for the First Circuit therein.

ARGUMENT.

I.

THE QUESTION OF JURISDICTION.

(a) Certiorari at common law and under acts of Congress prior to 1891.

The writ of certiorari is not mentioned by name in the Constitution or the statutes of the United States until the act of March 3, 1891. The First Congress, however (act 1789, c. 20, sec. 14; 1 Stat. 81, which now appears in substance in Revised Statutes, section 716) gave to the supreme, circuit, and district courts "power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." And this court, in *In re Chetwood*, petitioner (165 U. S., 443, 462), by Mr. Chief Justice Fuller, has said that—

> * * * under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *Amer. Construction Co.* v. *Jacksonville Railway* (148 U. S., 372, 380). And although, as observed in that case, this writ has not been issued as freely by this court as by the court of Queen's Bench in England, and, prior to the act of March 3, 1891 (c. 517, 26 Stat., 826), had been ordinarily used as an auxiliary process merely, yet whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice.

The writ of certiorari, therefore, under the Constitution and the statutes of the United States is strictly the common-law writ of that name with all its functions and attributes, so far as applicable to our system of jurisprudence.

At the common law, according to Fitzherbert and Burn, certiorari was an original writ issuing out of the Court of Chancery or the King's Bench, and directed in the King's name to the judges or officers of inferior courts, commanding them to certify or to return the records of a case pending before them, to the end the party may have a more sure and speedy justice.

Blackstone says of it (Vol. IV, p. 321):

> A *certiorari* may be granted at the instance of either the prosecutor or the defendant; the former as a matter of right, the latter as a matter of discretion. * * *

It was always granted at the request of the king, in whose name the justice of the people was invoked.

And in *Groenvelt* v. *Burwell* (1 Ld. Raym., 454, 469) it is asserted that certiorari lies in all judicial proceedings in which a writ of error does not lie.

If these were attributes of the common-law writ of certiorari, the power to issue which was granted by the act of 1789, and there be any close analogy between the enforcement of the law by the people in the name of the "King" and its enforcement by the people in the name of the "United States," there would seem to be ancient authority in support of the proposition that the granting of the writ by this

court in the case at bar, and the part taken in these proceedings by the United States, are entirely in accord with the usages and principles of the common law—that is to say, with the "usages and principles of law" referred to in the act of 1789 (*supra*).

The case at bar is within the appellate jurisdiction of this court. Section 5 of the act of March 3, 1891, provides that such a case involving the construction or application of the Constitution of the United States may be brought here on appeal or writ of error.

(b) Certiorari under Act of March 3, 1891.

Prior to the creation of the circuit courts of appeal, and since 1879, a defendant in any criminal case against whom, as against this respondent, judgment had been entered upon a verdict of guilty in a district court, must, in case of a division of opinion, on error in the circuit court, have had the question of the validity of such judgment certified to this court, and the Government then had the benefit of an authoritative determination of the case by the highest court in the land.

It seems to be settled (*American Sugar Refining Co.* v. *New Orleans*, 181 U. S., 277, 282) that the act of March 3, 1891, sections 5 and 6, gives to a defendant in any case involving, as this does, the construction or application of the Constitution of the United States, the choice of suing out his writ either from this court or from the circuit court of appeals. As to the exercise of his choice, the

Government has nothing to say and is compelled to accept his election, and, if he chooses the circuit court of appeals, to present its argument in support of the judgment below to that court. The contention, therefore, that this court is without jurisdiction of the case at bar involves the assertion that a defendant may elect to take his case, though raising questions of gravity and of importance to the whole people—such, for example, as the constitutional question here raised—to a tribunal of inferior rank, the decisions of which as to these questions are, or may be, at variance with those of other courts in the country of the same rank, or even of this court itself, and that the Government must abide by the result, though erroneous.

It has been frequently stated in one form of language or another, and is perfectly clear, that the act of March 3, 1891, was designed, not to diminish the power and authority of this court, but to lighten its burdens. Congress obviously intended to give final jurisdiction in no case to the circuit courts of appeal, without the reservation of power in this court to exercise the jurisdiction which it is necessary for the enlightened and uniform administration of justice that it shall always possess, over all such matters as, in its discretion, it deems important.

The act evidently means, and this court has heretofore always proceeded upon that assumption, that it might stretch out its hand and take away from the final determination of any circuit court of appeals, at any stage, before or after decision

rendered in that court, any case involving questions of gravity and general importance, or as to which there is conflict between the decisions of state and federal courts, or between those of federal courts of different circuits, and indeed involving any matter of special interest to the people. (*Forsyth* v. *Hammond, supra*, at page 512, bottom; *Fields* v. *United States, supra*, at page 296, top; *American Construction Company* v. *Jacksonville, Tampa & Key West Railway Company, supra*, pages 383, 384, bottom.)

In fact, this court has so broadly, emphatically, and clearly construed those portions of section 6 of the act, which are quoted on the second page of this brief, that there would seem to be little room to doubt, upon the decisions, that it has the same right to review a criminal case on certiorari on the application of the Government that it has to review a civil case. In *Forsyth* v. *Hammond* (*supra*) Mr. Justice Brewer, speaking for the court, at page 511 *et seq.*, elaborately discusses the reasons for the creation of circuit courts of appeal and the reservation of jurisdiction in the Supreme Court, and says (pp. 512, 513, 514):

> Cases of a class in which finality of decision was given to the Circuit Courts of Appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation. It was obvious that all contingencies in which a decision by this tribunal was of importance could not be foreseen, and so there was placed

in the act creating the Courts of Appeal, in addition to other provisions for review by this court, this enactment:

"And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

The general language of this clause is noticeable. It applies to every case in which but for it the decision of the Circuit Court of Appeals would be absolutely final, and authorizes this court to bring before it for review and determination the case so pending in the Circuit Court of Appeals, and to exercise all the power and authority over it which this court would have in any case brought to it by appeal or writ of error. Unquestionably the generality of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power. *The power thus given is not affected by the condition of the case as it exists in the Court of Appeals.* * * * *We reaffirm in this case the propositions* * * * *that the power of this court in certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court.*

The court was then apparently considering *all* the cases as to which, by the terms of the act, judgments or decrees of circuit courts of appeal were made final, including criminal cases, and it is hardly to be supposed that they were not all in the mind of the court when the portion of the opinion above quoted was penned.

The distinction must be borne in mind that the paragraph from section 6, last quoted, is a reservation of authority already existing in the court, and not a grant of new or additional jurisdiction. The power of Congress, upon the establishment of an inferior, intermediary tribunal, not only to reserve authority in this court to review all important cases, criminal as well as civil, on certiorari, but even to give it jurisdiction to review criminal cases on the appeal or application of the Government by a writ of error or on certiorari, is beyond question. (*Taylor* v. *United States*, 207 U. S., 120, 127; *United States* v. *Bitty*, 208 U. S., 393, 399, 400; *United States* v. *Sanges*, 144 U. S., 310, 323.)

It was held in the *Sanges* case (*supra*) that section 5 of the act of March 3, 1891, which provides that appeals or writs of error may be taken from the district courts or from existing circuit courts direct to the Supreme Court in any case, among others, that involves the construction or application of the Constitution of the United States, was not sufficiently specific to give to the United States the right to sue out a writ of error to review a judgment of a circuit court sustaining a demurrer in a criminal case in which

that court held certain Federal statutes to be unconstitutional.

The case at bar, however, presents a different situation under a different provision of law. The proposition which the Government urges here is not that it has any right of appeal which this court is bound to recognize, but that this court is vested by law with authority, under the jurisdiction reserved to it by section 6 of the act, to order any case of which a circuit court of appeals has final jurisdiction to be brought here from such court on certiorari, and to determine it in the same manner as if it were here on appeal or writ of error; that is to say, just as if, and filling in what seem to be the obvious ellipses of the statute, "it has been carried by appeal or writ of error" *by the defendant, the only person who could so carry it there,* "to the Supreme Court," *instead of to a circuit court of appeals.*

The question raised, then, is not, as in the *Sanges* case, the *right* of the United States to have this case reviewed, upon the theory that error has been committed, but the *power* of this court to review the case, when called to its attention, upon the theory that an important question is involved such as Congress has reserved to it the right to consider and finally determine in all cases which are "made final in a circuit court of appeals." Stated a little differently and more concisely, this court, as has been suggested, may exercise its jurisdiction whenever it chooses by issuing its writ of certiorari to remove such case

out of a circuit court of appeals, and deal with it precisely as if no such tribunal were in existence and the case had been brought by the defendant directly to the Supreme Court from the trial court; otherwise it would be true that the authority of this court to exercise jurisdiction in the interests of the whole people in such a case as this, for the purpose of determining an important question such as that here raised, might be cut off by a convicted defendant's choice of the *forum inferiorem*.

The United States is before the court in no sense as an appellant alleging error and demanding the right to have that error corrected. As petitioner for the writ, it merely performs the function of calling the attention of the court to the importance of the case and to the questions raised. It is here in behalf of its citizens, suggesting to the court that this is a case of such a nature that, for the benefit of the entire country, it should be reviewed and authoritatively determined by the highest court of the nation.

It is only when this court, acting upon that suggestion, issues the writ, and assumes jurisdiction, that the United States has the same right and the same opportunity to urge here its contentions upon the merits of the case that it had in the Circuit Court of Appeals, and that it would have had here if the respondent had summoned it into this court to answer to his writ of error instead of into the Circuit Court of Appeals.

There are two methods provided by section 6 of the act under discussion, by means of which impor-

tant cases pending in a circuit court of appeals and as to which that court has final jurisdiction, may be brought to this court for review, *first*, upon the initiative of the circuit court of appeals itself through its certificate; and, *second*, by this court by means of its writ of certiorari upon a suggestion contained in a petition showing a proper case. In either event, the whole matter in issue is to be decided here in the same manner as if it had been carried up by writ of error or appeal. It can not, we think, be seriously contended that, because this is a criminal case, the circuit court of appeals would have no right to certify any question raised upon the record before it to this court, and that thereupon this court would have no power to require "the whole record and cause" to be sent up to it for its consideration and to decide the whole controversy. Had such certificate been made, the situation would have been different from that which is here presented only in respect to the method by which the case reached this court and in the fact that the Circuit Court of Appeals has rendered a decision. It may be fairly argued, we think, that the provision whereby the Supreme Court may issue its writ of certiorari for review was inserted in the statute because Congress did not propose to leave it wholly within the discretion of the circuit courts of appeal to determine whether a question before it was sufficiently doubtful and sufficiently important to be reviewed by the Supreme Court.

We believe that the foregoing considerations lead to the conclusion that the jurisdiction of this court to review on certiorari cases within the final jurisdiction of a circuit court of appeals, and pending in that court, is not limited to civil cases, criminal cases in which the writ is sought by the defendant, and cases sent here on certificate by a circuit court of appeals, but broadly extends to all cases which are of sufficient gravity and importance to make their decision by this court imperative or desirable, including a criminal case, like that at bar, determined by a circuit court of appeals in favor of the defendant, and called to the attention of this court through the instrumentality of a petition brought by the United States.

The difference between the contention of the Government in the Sanges case that, by section 5 of the Judiciary Act the United States was given the right to take a criminal case involving constitutional questions decided against it in the trial court on writ of error to this court, and to demand the opportunity to be heard here, and its contention now that by section 6 power was reserved in this court to bring up of its own motion, or upon the suggestion of the Government, and to review a case involving a constitutional question which the defendant has elected to take to the circuit court of appeals, is manifest, and the fact that such review might entail the same results as if it were an appeal by the United States from the decision of the circuit court of appeals, can be, we think, of no consequence.

There is, of course, no question of jeopardy raised. The validity of the respondent's trial is in issue upon his writ of error from the circuit court of appeals, and he is bound to accept all the legitimate consequences which may follow. (*Trono* v. *United States*, 199 U. S., 521, 534.)

II.

THE MERITS OF THE CASE.

It has already been stated (brief, p. 4) that the only questions upon the merits for argument in this court, naming them in the order of their importance, are: (*a*) The constitutional question raised by the motion in arrest of judgment (Rec., p. 39; Errors 53 and 54); and (*b*) the sufficiency of the indictment (Rec., pp. 2–28; Errors 1, 2, and 3).

(*a*) THE CONSTITUTIONAL QUESTION.

1. How raised?

More than two years after a verdict of guilty had been returned against him, and pending the allowance of a long and complicated bill of exceptions, over both the form and substance of which it is fair to assume, from the lapse of time, there was much controversy, this respondent, having employed new counsel, filed in the trial court a motion in arrest of judgment, claiming that the verdict against him was invalid by reason of the fact that it was returned by a jury composed, at the time it was rendered, of ten only. This claim was made notwithstanding his deliberate written consent, of record in the trial

court, that two of the jury originally impaneled be excused for substantial reasons appearing upon the record and already referred to, and his agreement, also in writing and of record, that the case thereupon proceed before the remaining jurors with the same force and effect as if the two jurors had not been excused.

Whatever views one may entertain with regard to such a claim made under such circumstances, when measured by the ordinary standards of good faith, honor, and decency, they ought, perhaps, to find no expression in this argument. A layman might be permitted to be indignant, but we must proceed unruffled to a discussion of the question as if no such considerations were involved.

The contention, then, of the respondent that the trial court erred in denying this motion, as already stated, in a slightly different form (brief, p. 4), is this:

If one indicted for a criminal offense punishable by a substantial term of imprisonment and designated a misdemeanor by the statute creating it, is put upon trial in a federal court and twelve duly qualified jurors are sworn to try the issue, and the tribunal to which he is entitled by law having thus been constituted, his trial proceeds before it, and thereafter, during the progress of the trial, two of the jurors are incapacitated, and the defendant requests, and in writing over his own signature consents, that the case proceed to a verdict by the remaining jurors, and a verdict of guilty is rendered, he may, nevertheless, escape the consequences of that verdict on the

ground that the jury which the Constitution (Article III) prescribes for the trial of "all crimes," while not denied him and completely constituted at the inception of his trial, had ceased, though by reason of his consent and at his own request, to be such a jury, when the verdict was announced, and that by logical deduction he has, therefore, never been tried at all.

2. Article III. The Sixth Amendment and the common law.

This contention must find support or refutation in the construction to be put upon Article III, section 2, paragraph 3, of the Constitution:

> The trial of all crimes, except in cases of impeachment, shall be by jury,

and upon this language in the Sixth Amendment:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.

The important provisions just quoted have naturally been the subject of frequent and careful analysis by this court and by text-writers, but never, so far as the judges who rendered opinions in this case in the Circuit Court of Appeals, or counsel on either side, have been able to ascertain, by way of answer to the precise question which is presented here. In all that has been said, however, there can not fail to be much to illumine the path of one who is seeking the answer to that question. Much can be eliminated at the outset. It is not necessary, for example, for the Government to deny that

Article III of the Constitution demands that, despite any agreement of parties, the trial of every criminal case in the federal courts, except of that minor class mentioned in *Schick* v. *United States* (195 U. S., 65) and elsewhere, must, in order that jurisdiction may attach, be *begun* before a jury composed, as at common law, of twelve men; nor to discuss at length, or express an opinion upon, the propriety or legality of permitting one on trial for a *capital offense* to consent to a reduction in the number of jurors during his trial; nor even to suggest what would have been demanded in this respect in the case of a felony at common law. However interesting a pursuit of some of these inquiries might be, their discussion here would be purely academic, except so far, indeed, as it might help to throw light upon the solution of the question before us.

Putting it a little differently, we may admit, for the purposes of this argument, that Article III is not satisfied unless twelve duly qualified jurors are impaneled at the outset. That was done in this case. We may admit, also, *in favorem vitæ*, that under the tradition and custom of the common law it is imperative that the question of life or death be passed upon by a full panel, just as we should admit that there would be a mistrial of such a case at the common law if, *e. g.*, the jury were not kept impounded from impaneling to verdict. But this case is not capital. We may concede, further, though with a little more hesitation, that the rule as to such waiver was, for obvious reasons, probably the same at com-

mon law with regard to all crimes made felonies by the common law, as it is now in a capital case. But this is not a felony either at common law or by statute.

At this point we agree that if, in this twentieth century, in the United States, any reasonable distinction, based upon controlling grounds of public policy exists, or should be allowed to continue to exist, between a felony not capital and a grave misdemeanor, sufficient to justify a difference in respect to the application of the principle we are discussing to the one and the other, it is a very nice and arbitrary one.

With so much by the way of preface, we come now to consider the construction of the material language of Article III and its application to the question as it is raised here. What must the framers of the Constitution have meant by providing that "The trial of all crimes * * * shall be by jury?" is an inquiry which has been frequently made at the bar of this court. The only words requiring definition in this provision are "crimes" and "jury." That they must clearly be defined in the light of their common-law significance at the time the Constitution was adopted is elementary, and that they must be applied in view of the changes and developments which the last century has inevitably brought about in the practical administration of criminal justice in this country is, we believe, equally true. It is well settled that a jury at common law was a jury of twelve, and that it

is to such a jury that both Article III and the Sixth Amendment refer.

3. What is meant by "crime" at common law?

Definitions of "crime" have been many and various. Erskine, though perhaps not with perfect accuracy, defines the word as "an injury to society through a breach of some of its reciprocal relations." It was said by Chief Justice Taney, in *Kentucky* v. *Dennison* (24 How., 66, 99), that "The word 'crime' of itself includes *every offence, from the highest to the lowest* in the grade of offences, and includes what are called 'misdemeanors' as well as treason and felony." That this court does not now regard this last definition as wholly accurate is obvious. (*Callan* v. *Wilson*, 127 U. S., 540; *Natal* v. *Louisiana*, 139 U. S., 621; *Schick* v. *United States*, 195 U. S., 65.)

Blackstone says, "A crime or misdemeanor is an act committed, or omitted, in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms; though, in common usage, the word 'crime' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler names of 'misdemeanors' only." (4 Bl. Com., p. 5.)

4. Felonies and misdemeanors at common law and to-day.

It has been repeatedly suggested, in argument and elsewhere during this controversy, that the answer to the question raised here as to waiver may depend upon the class of offenses to which that charged against this respondent belongs, whether felony or misdemeanor, and it is undoubtedly true that many state courts and writers upon constitutional and criminal law have made such a distinction or intimated that it exists. As to this, it is sufficient to say that while the legality of a waiver of this sort in respect to a felony has frequently been questioned and often denied, it has never been denied, we believe, where the charge was a misdemeanor. It will be interesting and profitable, perhaps, to consider for a moment how far any such distinction is tenable and can be reasonably applied in modern criminal procedure. At common law, a felony was an offense which occasioned a total forfeiture of either lands or goods, or both, to which capital or other punishment might be superadded, according to the degree of guilt. (1 Hale P. C., 411; *Bannon* v. *United States.*, 156 U. S., 464, 467.) A misdemeanor at common law was an indictable offense not amounting to a felony.

There can be no doubt that "crimes" as used in Article III included both felonies and misdemeanors as they were defined at common law in 1789, and that, in general, Article III contemplates, and the Sixth Amendment secures the right to, such a tribunal as under the common law of England was pro-

vided for the trial of crimes, subject, however, to such rules of procedure as were in force under the common law with respect to the trial of various classes of offenses, depending upon their gravity. We find, for example, as might have been expected, that the precautions taken in England from very early times, which still survive to some extent, at least, in this country, with regard to juries, for the protection of persons charged with crime, were greater in cases of some offenses than others. Such, for example, as the precaution of segregating a jury during the trial of a capital case, to which allusion has already been made.

In our American jurisprudence, apart from arbitrary statutory definition, the word "felony" has no distinctive, well-defined meaning. While it is still used, its significance is vague and indefinite. (*Mitchell* v. *State*, 42 Oh. St., 383, 386.)

As to felonies and misdemeanors, it may be said that though the nomenclature has survived, the distinction has been largely obliterated. Stephen in his "History of the Criminal Law of England" (Vol. II, p. 193) says: "So long as the punishment of death and the law relating to benefit of clergy were in force, the distinction between felony and misdemeanour was not only an important but might almost be described as an essential part of the law, but since the substitution of milder punishments for death, the distinction has become unmeaning and a source of confusion, especially as many offences have been made misdemeanours by statutes, which render

the offender liable to punishment as severe as those which are now usually inflicted upon persons convicted of felony." And the same writer (Vol. I, p. 487) says that "Death was at common law the punishment of all felonies except petty larceny and mayhem." This was true in 1789. Since then, however, common-law felonies have become reduced to the few crimes still punishable by death, so that, for practical purposes, offenses against the United States, at least with respect to their gravity as indicated by the punishment attached, may be divided, to-day, into three classes: (1) Capital crimes (treason, murder, rape); (2) crimes not capital; and (3) violations of police regulations.

As to the last named, it is settled that the Constitution does not guarantee the right to a jury trial; as to the first, no one will deny that there are reasons not existing in other cases which make it humane and proper to surround one on trial for his life with every safeguard that can be devised consistently with an effective administration of criminal justice; and, accordingly, as has already been suggested, many requirements are insisted upon in the conduct of such a trial which are not regarded as essential in others. It is, then, as to the *second class* of offenses, comprising both those which are termed "felonies" and those which are termed "misdemeanors" in the various statutes creating them, that our question remains unanswered, or not fully answered, by the authorities; and this court is now called upon to assert specifically whether *a waiver*

under the circumstances at bar is permitted by the Constitution in none of the cases comprised in the second class, in all such cases, or only in those which Congress has seen fit to term "misdemeanors."

5. Cases in which waiver of a full jury or reduction by consent during trial have been considered.

The cases in which the question to be determined here, or a similar question, has arisen under the varying language of state constitutions[a] and statutes are, as has been suggested, conflicting. Without citing them all, it is, perhaps, enough to say that there are four types illustrated by (1) *Cancemi* v. *People* (18 N. Y., 128), *a capital case* decided in 1858 by the Court of Appeals of the State of New York, in which one of the jurors was withdrawn from the panel by consent, after the beginning of the trial, and the court held, upon a verdict of guilty, that the consent of the prisoner to such verdict by less than a full jury of twelve was a nullity and the conviction illegal; (2) *State* v. *Ellis* (22 Wash., 129), *an information for robbery*, decided in 1900, in which, by consent of the defendant in writing, a full panel was reduced to eleven, during the trial, because of the illness of a juror, and the court held the verdict void; (3) *State* v. *Kaufman* (51 Iowa, 578), *an indictment for forgery*, decided in 1879, in which, under circumstances similar to those in the *Cancemi* case, except that the case was not capital, the contrary was held; and (4) *Commonwealth* v.

[a] See Appendix *post*.

Dailey (12 Cush., 80), *a misdemeanor*, decided in 1853, in which Chief Justice Shaw, speaking for the Supreme Judicial Court of Massachusetts, held that such waiver did not invalidate the verdict. It is noteworthy that the court in *Cancemi* v. *People* (*supra*) does not discuss or cite *Commonwealth* v. *Dailey*, nor is any mention of it made in *State* v. *Ellis*. In the latter case, although the situation, except for the fact that the offense charged was a common-law and statutory felony, and one juror only was withdrawn from the panel, was the same as the case at bar, the attention of the court was apparently not called to the distinction between a trial begun before a full panel which is afterwards diminished by consent, and one begun by agreement before less than a full panel. This is made clear by the reasoning of the court near the end of the opinion (p. 134): "If they (the State and the defendant) could refer it to a tribunal consisting of eleven men, they might with equal authority refer it to a referee selected by themselves independent of the statute." The court entirely overlooks the argument that a tribunal for the trial of crimes is not complete and that jurisdiction does not attach unless a jury of twelve is impaneled, and that, when such a jury is impaneled, jurisdiction is complete. Seevers, J., in *State* v. *Kaufman* (*supra*), had both the *Cancemi* case and the *Dailey* case before him and discusses the question raised here, apart, of course, from its aspect under the Federal Constitution, with great care and ability.

More or less in line with the doctrine of *Commonwealth* v. *Dailey*, and to be read in this connection, are: *Opinions of Justices* (41 N. H., 552); *State* v. *Almy* (67 N. H., 274, 280); *State* v. *Worden* (46 Conn., 349, 368); *Lavery* v. *Commonwealth* (101 Pa. St., 560); *Craig* v. *State* (49 Oh. St., 415, 416, 419); *State* v. *Sackett* (39 Minn., 69); *State* v. *Woodling* (53 Minn., 142); *Edwards* v. *State* (45 N. J., L. 419); *Murphy* v. *State* (97 Ind., 579); *Moore* v. *State* (52 S. E. Rep., 81). Of these cases the *Dailey*, *Lavery*, *Sackett*, *Woodling*, and *Moore* were misdemeanors; the others were felonies.

To the same effect, also, as *Commonwealth* v. *Dailey*, and quoting it with approval, is *United States* v. *Shaw* (59 Fed., 110, 114). See also *West* v. *Gammon* (C. C. A. Sixth Circuit, 98 Fed., 426), in which Day, J., speaking for a unanimous court, says, at page 429: "It was the purpose of the Constitution to preserve to the accused the right, not the necessity, of a trial by jury."

6. Supreme Court cases considered.

With regard to the relation between Article III and the Sixth Amendment, this court in *Callan* v. *Wilson* (127 U. S., 540, 549) has said that there is no necessary conflict between them; and, in *Schick* v. *United States* (195 U. S., 65, 68, bottom) that "If there be any conflict between these two provisions the one found in the amendment must control, under the well-settled rule that the last expression of the will of the lawmaker prevails over an earlier one."

The *Schick* case construes the word "crimes" in Article III, and "criminal offenses" in the Sixth Amendment, as not including petty offenses, and holds that as to such petty offenses a jury in the District of Columbia may be waived altogether. In the course of the opinion by Mr. Justice Brewer, *Commonwealth* v. *Dailey* (*supra*), *State* v. *Kaufman* (*supra*), and *State* v. *Worden* (*supra*), are cited with approval, and the opinion of Chief Justice Shaw in the *Dailey* case is quoted from at some length.

In *Thompson* v. *Utah* (170 U. S., 343)—an authority largely relied upon by this respondent—the court, by Mr. Justice Harlan, says, at page 351, that it was Thompson's "*constitutional right to demand* that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons;" and again, at page 353, that "It is sufficient to say that it is not in the power of one accused of *felony*, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force, when this crime was committed, did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons." In that case, the trial began before a jury of eight, as provided by the law of the State of Utah, and the defendant allowed it to proceed to a verdict against him without objecting on that account, and is authority only for the proposition, which is not denied in the case at bar, that no agreement, express or implied, *can confer*

jurisdiction under the Federal laws, upon a tribunal composed at the outset of a judge and less than twelve jurors.

In *Maxwell* v. *Dow* (176 U. S., 581) the court, at page 603 (Mr. Justice Harlan dissenting), holds that "trial by jury has never been affirmed to be a necessary requisite of due process of law;" and in *Hawaii* v. *Mankichi* (190 U. S., 197) that the right to a trial by jury is not fundamental in its nature, but concerns merely a method of procedure (p. 218). The same thing is suggested in *Dorr* v. *United States* (195 U. S., 138, 148).

In *Queenan* v. *Oklahoma* (190 U. S., 548), which was an indictment for murder, it transpired during the course of the trial that one of the jurors was disqualified from serving by reason of a conviction for felony. Upon this fact being made known, counsel for the prisoner were asked what they desired to do, and replied that they had nothing to say. Whereupon the trial proceeded to a verdict of guilty. Thereafter the defendant undertook to avoid the verdict by setting up that he had been deprived of a constitutional right which he could not waive. The court (pp. 551, 552), by Mr. Justice Holmes, says, "The contrary plainly is the law as well for the Territories as for the States * * * The prisoner had no right to complain * * * It was his duty to object at the time if he was going to object at all. He could not speculate on the chances of getting a verdict and then set up that he had not waived his rights." It is to be observed that this

was a capital case, and that, though the jury consisted of twelve men, one of them was, with respect to jury duty, *civiliter mortuus*, so that the verdict was returned by a panel, eleven only of whom could be legally counted as jurors. In this connection, see *The Queen* v. *Sullivan*, 1 P. & D., 96, and *King* v. *Sutton*, 8 B. & C., 417.

If, then, recapitulating these propositions from the decisions of this court last cited, it is true that—

(1) Trial by jury is not a necessary requisite of due process of law; and if,

(2) The right to such trial is not fundamental, but concerns merely a method of procedure; and if,

(3) Article III is to be applied in the light of the Sixth Amendment as the last expression of the will of the lawmakers; and if,

(4) In a capital case, a defendant may, by acquiescence, consent that his trial proceed before a jury, eleven only of whom are legally qualified to serve as jurors; and if, further,

(5) The authority of *Thompson* v. *Utah* is properly to be restricted to the trial of felonies and held to decide, as to these, only that under the Constitution of the United States they can not be *begun*, by agreement, express or implied, with less than a common-law jury; and if, moreover, it is true that,—

(6) While Article III is the prescription of a jury trial in criminal cases as it existed at common law at

the time of the adoption of the Constitution, the Sixth Amendment, on the other hand, is *cuilibet jus pro se introductum*, and gives to a person charged with crime the right to insist upon such a trial as is prescribed by Article III,—

We feel justified in asking this court to say that the right to a trial by jury secured to this respondent by the Sixth Amendment was not denied him; that jurisdiction of the offense charged against him was duly acquired by the tribunal prescribed by Article III, namely, a tribunal constituted of a judge and a common-law jury; that the provisions of Article III and the Sixth Amendment were therefore fully complied with; that a jury trial having been granted him and jurisdiction having once attached, it could not be divested, and that it was thereafter, during the progress of this trial, competent for him to consent, if he believed it for his interests, that the panel be diminished by two, and to agree to accept a verdict of ten as of the same force and effect as a verdict of twelve; and that if it is possible to-day to make any rational distinction in the rule of law in this respect between a felony and a misdemeanor, and the court feels bound by the dictum quoted *supra* in *Thompson* v. *Utah*, there is at least no authority or ground for withholding the application of the doctrine of permissible waiver from offenses which are by statute denominated misdemeanors.

7. As consent can not endow a tribunal with jurisdiction, so it can not divest it of jurisdiction that has once attached.

The respondent's argument in the Court of Appeals was an elaborate and convincing demonstration of a proposition upon which there is not the shadow of controversy between us, namely, that no agreement of parties can *confer jurisdiction* in violation of the peremptory mandate of Article III; that is to say, upon a tribunal consisting of a judge and less than twelve jurors. That this proposition is a correct statement of the law we do not dispute. We believe, however, that it is equally true, that when jurisdiction has once attached, when the tribunal prescribed by Article III has once been constituted, as in the case at bar, the defendant's agreement, whether honestly or perfidiously accorded, that one of the jurors be discharged can not operate to divest or impair that jurisdiction.

The death, or other disability, of a juror can not, we think, affect jurisdiction, once acquired. It merely creates a situation in which the defendant on trial may invoke the Sixth Amendment, if he chooses. If he does not choose to invoke it, the court may proceed with undiminished jurisdiction, with a jury which has suffered "a fractional loss," to determine the case.

There are two essential incidents of a criminal trial that the accused can not waive—one is *jurisdiction* and the other *due process of law*.

In *Ex parte Bain* (121 U. S., 1), relied upon by the respondent, no jurisdiction over the trial ever attached, because the indictment upon which the accused entered his plea of not guilty, and upon which he put himself upon the country for trial, was not the indictment of a grand jury. His agreement that it might pass as such could not confer jurisdiction upon the court, and his conviction was held illegal.

So, too, in *Crain* v. *United States* (162 U. S., 625), also cited by the respondent, there was no jurisdiction because no arraignment and no plea. The accused had never been put upon trial.

In *Thompson* v. *Utah*, *supra*, jurisdiction never attached because the trial began with a jury of eight.

In *Hopt* v. *Utah* (110 U. S., 574) the absence of the accused during the progress of the trial was said to be a violation of due process of law, and the trial was, therefore, held void. But in *Maxwell* v. *Dow*, cited *supra* and elsewhere, this court has held that trial by jury has never been affirmed to be a necessary requisite of due process of law. So that the verdict in the case at bar can not be attacked—and, indeed, is not attacked—on that ground.

In contemplation of law, jurisdiction once attached endures to the end, and a convicted defendant can attack a verdict against him only upon the grounds that the tribunal by which he was tried never acquired jurisdiction (as in *Thompson* v. *Utah*), or, that the trial was lacking in some necessary element of due process of law (as in *Hopt* v. *Utah*). Neither one of

these grounds exists in the case at bar. Complete jurisdiction was obtained, and the diminution of the panel by two took from the trial nothing of that due process of law essential to make it a trial in accordance with the provisions of the Constitution of the United States.

In other words, so far as Article III and the Sixth Amendment are concerned, the following situations with respect to a jury trial may arise:

(1) An attempt to compel one accused of crime to go to trial before a jury consisting of less than twelve, without his assent and against his objection. Such trial would be doubly void, in the first place, because the tribunal by which he was tried would not be the tribunal peremptorily prescribed by Article III; and, in the second place, because his demand for such a tribunal, as of right under the Sixth Amendment, had been ignored. This was not the situation in the case at bar.

(2) The putting of one accused of crime on trial before a jury of less than twelve, with his consent, express or implied. Such trial, it is conceded, would be void under Article III for lack of jurisdiction in the tribunal, which could not be supplied by consent. This, also, was not the situation in the case at bar.

(3) The putting of one so accused on trial before a tribunal conforming in all respects with the mandate of Article III, and thereby clothed with jurisdiction to try the case. Thus far, this *was*, admittedly, the situation in the case at bar.

In the course of such trial, so begun, however, and upon the death or disability of one or more of the jurors, two different contingencies with respect to the integrity of the panel may arise: *First*, a refusal on the part of the defendant to proceed with less than twelve, involving a demand for the discharge of the jury and a new trial. Such demand must be acceded to, not, however, upon the ground that jurisdiction once acquired has been destroyed or impaired by the death or illness of the jurors, but because the Sixth Amendment gives the defendant the right to insist, if he chooses, upon a verdict of twelve men. Or, *second*, a consent on the part of the defendant, express or implied, to continue the trial with a less number. In this event, the jurisdiction is still there, and, as we have said, can not be destroyed or impaired. His consent operates, and can operate, only to the extent of waiving the provisions in his favor contained in the Sixth Amendment. And thus the peremptory mandate of Article III, having been complied with, and the objection of no jurisdiction having been avoided, we have reached at last the point in the trial where the only provision of law affecting a reduction of the jury is the *lex pro se introducta*, the Sixth Amendment, and the operation of the hackneyed maxim, *volenti non fit injuria*.

In other words, more concisely put, we agree with the respondent—and he need hardly have been at such pains in arguing—that the trial of a "crime" in the federal courts which is begun before a jury of less than twelve is a nullity for lack of jurisdiction;

that no consent of parties, though approved by the judge, can confer such jurisdiction.

We deny, however, that jurisdiction once obtained can be divested as a result of the agreement or acts of the parties.

We admit that, jurisdiction having attached, as in the case at bar, the defendant, upon the diminution of the panel by the illness of a juror, then had the right, which no power could gainsay, given him by the Sixth Amendment, to insist upon the discharge of the entire panel and upon a new trial.

We contend that it was within his power not to so insist, if he chose, and to consent to go on and to take the verdict of eleven or ten as of the same force and effect as that of twelve. The *second* contingency above stated was the precise situation in the case at bar.

Every constitutional provision necessary to invest jurisdiction was complied with; nothing was denied to the respondent upon which he had a right to insist; a verdict was rendered by ten men by whose determination of the issue between him and the United States this respondent, having been given an opportunity to invoke the Sixth Amendment, and explicitly declining to do so, had deliberately agreed to abide.

The whole question turns, or may turn, it seems to us, on whether there can be a destruction or impairment of jurisdiction once acquired under such circumstances as these—whether in contemplation of law, it is true that the jury of twelve, required by the Constitution and impaneled in this case, remained a

constitutional jury to the end, though suffering a "fractional loss," with the defendant's consent. (*Interstate Consolidated Street Railway Co.* v. *Com. of Massachusetts*, 207 U. S., 79, 87.)

In short, the specific contention of the Government, upon this branch of the case, and the proposition which it has undertaken to maintain, is that *it is not obnoxious to the Constitution nor to any principles of public policy or sound reason, nor to the enlightened administration of justice, nor is it violative of any natural right of a person accused of crime, to hold it to be law in the United States that a valid judgment may be entered upon a verdict of guilty of an offense of the kind charged in this indictment, where the right to a trial by a jury of twelve is not denied the accused, and such a jury is actually impaneled, and thereafter the accused, by deliberate waiver, consents that two of the twelve jurors be excused, and solemnly declares that he is content to accept, and will accept, the verdict of the ten remaining jurors as of the same force and effect as that of a jury of twelve.*

(b) THE SUFFICIENCY OF THE INDICTMENT.

By assignments of error 1, 2, and 3 (Rec., pp. 150, 151, 152) the claim is made by this respondent that the indictment (Rec., pp. 2–28) does not, with clearness and with that reasonable certainty required by law, set forth the offense or offenses with which he was charged, and that the district court erred in overruling the demurrers filed by him.

An indictment is sufficient if it sets forth clearly the necessary data and essential elements of the offense intended to be charged with such particularity and substantial accuracy that the court can determine whether, on its face, the indictment discloses a crime; if the accused is reasonably informed of the charge which he is called upon to meet; and if the record shows to what extent he may plead a conviction or acquittal in bar to any subsequent prosecution for the same offense.

The tendency of legislatures, courts, and pleaders of the present day is to simplify criminal pleadings as far as is consistent with the provisions of the Constitution sensibly construed. Such tendency is illustrated by United States Revised Statutes, section 1025, and by the forms prescribed or permitted by statute in Massachusetts (Rev. Laws (Mass.), chap. 218, secs. 34, 67). This is upon the principle, in part, at least, that the Constitution should be invoked as a protection to the innocent, not as a sanctuary of refuge for the guilty.

The offenses charged in this indictment are misdemeanors (R. S., 5209), and the test of the sufficiency of the indictment must be controlled by the rules applicable to misdemeanors, and not to felonies, so far as they differ. (*Jewett* v. *United States*, 100 Fed., 832, 840; *United States* v. *Britton*, 107 U. S., 655, 661, 665.)

The main argument in support of the alleged insufficiency of the indictment in this case is that a

charge, under Revised Statutes, 5209, of "willfully misapplying" the money, funds, or credits of a national banking association, must be supplemented by further averments showing how the misapplication was made, and that it was an unlawful one (*Batchelor* v. *United States*, 156 U. S., 426), and this, of course, must be admitted. The question at issue here is whether or not the indictment does sufficiently show how the alleged willful misapplication was made, and that it was an unlawful one.

The first case which naturally suggests itself in support of the indictment is that of *Jewett* v. *United States* (*supra*), decided by the Circuit Court of Appeals for the First Circuit on March 29, 1900. In that case the pleader charged in the indictment a misapplication by the defendant as agent of the Lake National Bank of Wolfboro of certain "assets of the association, consisting of certain credits, certain money, divers promissory notes, divers certificates of deposit, divers gold coins, and divers silver coins, of all of which a more particular description was alleged to be to the jurors unknown" (p. 834). The opinion of the court does not set forth the exact language of the indictment, but the fact is that the language of count 84 of the indictment referred to charged that certain moneys, etc., said Jewett "did secretly and by some means and in some manner to the jurors unknown unlawfully, fraudulently, and willfully misapply and convert to his, said Jewett's, own use, with intent then and thereby to injure and defraud the Lake

National Bank of Wolfboro and divers of its shareholders, a more particular description of whom is to the jurors unknown."

In the indictment in the present case the charge was, in each of the three counts upon which Dickinson was found guilty, namely, the *first, third,* and *fifteenth counts* of the indictment, in substance that Foster, cashier of the South Danvers National Bank, certain credits, etc., of the bank did—

"Wilfully misapply by then and there unlawfully, fraudulently, knowingly, wilfully, and designedly, without the knowledge and without the consent of said The South Danvers National Bank, converting said money, funds, credit and credits, and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same, and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank."

Then follows an allegation in substance that said Foster as cashier, in the manner and form aforesaid, unlawfully, fraudulently, knowingly, wilfully, and designedly did wilfully misapply and convert said money, funds, and credits to the use, benefit, and advantage of said Dickinson, and deprive the bank of the same, and of the use and benefit thereof, with intent of said Foster then and thereby to injure and defraud the bank. The indictment then proceeds to allege that Dickinson, on the day alleged

in the preceding part of the count, well knowing the premises, and well knowing that said Foster was then cashier of the bank, "did unlawfully, fraudulently, knowingly, wilfully, and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such cashier, to commit the offense and crime of wilfully misapplying said money, funds, and credits of the bank, in manner and form and with the intent aforesaid, with the intent of said Dickinson then and thereby to injure and defraud the bank."

Reducing the charge of the indictment to its simplest terms, it is that Foster as cashier wilfully misapplied the money, funds, and credits of the bank by fraudulently converting them to the use and benefit of Dickinson, with intent to injure and defraud the bank, and that Dickinson, with the same intent to injure and defraud the bank, unlawfully, fraudulently, and wilfully incited, aided, and abetted Foster in misapplying the funds of the bank by converting them to Dickinson's use and benefit, with intent to injure and defraud the bank.

In this indictment there is no allegation that the manner whereby the funds of the bank were misapplied was unknown to the grand jurors. On the contrary, the manner in which the misapplication was made is shown, namely, by conversion of the funds of the bank to the use of another person who had no right to them, fraudulently and with intent to injure the bank.

The defendant will doubtless rely, as he did in the Court of Appeals, in arguing the insufficiency of the indictment, upon *Batchelor* v. *United States* (*supra*), which holds that inasmuch as the words "wilfully misapplies" have no settled technical meaning, and do not of themselves fully and clearly set forth every element to constitute the offense intended to be punished, they must be supplemented by further averments showing how the misapplication was made, and that it was an unlawful one, because without such averments there is no sufficient description of the exact offense with which the defendant is charged, so as to enable him to defend himself against it, or to plead an acquittal or conviction in bar of a future prosecution for the same cause (p. 429). That indictment, however, was so confused, uncertain, and ambiguous, as the court says, at page 431, that neither the accused nor the court could be called upon to pick out and put together from its allegations enough to make out a sufficient charge of unlawfully misapplying funds of the banking association. The judgment in that case was reversed, because the whole indictment was hopelessly mixed, confused, and unintelligible, and if the court could have understood what the pleader intended, it would still be left in doubt whether the allegations showed that the manner in which the bank's funds were misapplied was an unlawful one.

On the other hand, in *Coffin* v. *United States* (156 U. S., 432), it was held that an indictment charging that one Haughey, as president of the Indianapolis

National Bank, did unlawfully, feloniously, and willfully misapply the moneys, funds, and credits of said association, which were then and there under his control, with intent to convert the same to the use of the Indianapolis Cabinet Company, by causing the sum of $6,318 to be paid to said company upon a check drawn by said company upon the bank, which the company was not entitled to draw from the bank because it had no funds in the bank to its credit, and was then, as Haughey knew, insolvent, all of said acts being done with intent to injure and defraud the bank, and further alleging that Coffin and others unlawfully, willfully, knowingly, and feloniously, and with intent to defraud the bank, did aid and abet Haughey, as aforesaid, to wrongfully, unlawfully, feloniously, and willfully misapply said sum of money, sufficiently set forth a violation of Revised Statutes 5209.

In *Evans* v. *United States* (153 U. S., 584) the defendant was charged with fraudulently aiding and abetting the cashier of a national bank to misapply certain moneys, funds, and credits of the bank, with intent to injure and defraud the bank, by fraudulently surrendering to the defendant a note previously discounted by the bank and overdue and unpaid, which was held as a part of the funds and credits of the bank, without receiving the face of the note therefor or any part thereof. The court said (p. 590): "Every element of the offence being set forth in the earlier part of the count, there was no necessity of repeating it when the particular credit misapplied

is described, nor of negativing every possible theory consistent with an innocent delivery of the note to the defendant. * * * The general words of a fraudulent misapplication to the use and benefit of the defendant, and of an intent by so doing to defraud the bank, are of themselves inconsistent with an honest purpose. Indeed, the word 'surrender' carries with it something more than a bare delivery and indicates a transfer of title as well as of possession."

In the present case it will be noted that the preamble to the indictment charges that the South Danvers National Bank had, before and at the time of the commission of the offense thereafter charged—

"An account and credit with the Suffolk National Bank of Boston, a national banking association, * * * and did, from time to time at, before and after the commission of said offence, make deposits of moneys, funds, and credits to the credit of its said account with said The Suffolk National Bank of Boston, and did at all said times charge its said account for moneys, funds, and credits paid and applied by said The Suffolk National Bank of Boston for the use and purposes of said The South Danvers National Bank; that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business."

In the second paragraph of the indictment, which has already been set forth in part, one of the credits alleged to have been fraudulently converted to the use of Dickinson was "said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of $3,537.92," and "certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of $3,537.92," and "a certain credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value of $3,537.92, a more particular description of said moneys, funds, credit and credits being to said jurors unknown."

It would seem that the conversion with fraudulent intent to the use of a third person of a credit or deposit of one national bank in the hands of another, the dishonest purpose of the bank officer and of such third person being clearly set forth, was as effectually a violation of Revised Statutes 5209, as surrender and delivery of a note belonging to the bank by the cashier to a third person as in the *Evans* case.

Fraudulent conversion of the bank's property to the use of another certainly carries with it as much a transfer of title as the word "surrender" was held to do in the *Evans* case.

It is not necessary that the words "convert to the use of another" should have a well-understood technical meaning, because it is requisite only that the

manner or mode of misapplication of the moneys of the bank should appear to be unlawful, and done with intent to injure and defraud the bank. Applying the *Evans* case, if the bank received value for the funds converted to the use of Dickinson, it was clearly a matter of defense. So if at the time of the conversion the bank received security as a part of the same transaction, this would undoubtedly be a defense.

It is not necessary, either in criminal or civil pleading, to anticipate or negative a defense. If the defendant Dickinson did not receive the money alleged to have been converted to his use by Foster, or if he received it for an honest and legitimate purpose, those facts were open to him in defense of the indictment.

The allegation that a more particular description of the money, funds, and credits alleged to have been willfully misapplied was unknown to the grand jurors is sufficient. "The true rule is that where nothing appears to the contrary, the verity of the averment of want of knowledge in the grand jury is presumed." (*Coffin* v. *United States, supra,* p. 451.)

The manner in which the alleged unlawful procurement by Dickinson was effected was not necessary to be set forth (*Coffin* v. *United States, supra,* p. 448); and it is sufficiently alleged that at the time of such procurement Dickinson knew that Foster was cashier of the bank. (Ibid, p. 449.)

It is submitted that the court has authority to issue the writ of certiorari, and that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the Circuit Court affirmed.

CHARLES J. BONAPARTE,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

ASA P. FRENCH,
United States Attorney.

APPENDIX.

Constitutional provisions of Massachusetts, New York, Iowa, and Washington, with regard to jury trial in criminal cases.

Massachusetts, Part I, Art. XII (~~*ante*, pp. 31, 32~~):

"No subject shall be . . . deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury."

New York, Art. I, sec. 2:

"The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever."

Iowa, Art. I, pars. 9 and 10:

(9) "The right of trial by jury shall remain inviolate."

(10) "In all criminal prosecutions . . . the accused shall have a right to a speedy and public trial by an impartial jury."

Washington, Art. I, secs. 21 and 22:

(21) (Same as Iowa, (9) *supra*.)

(22) "In criminal prosecutions the accused shall have the right to . . . have a speedy and public trial by an impartial jury."

O

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PETITIONER,
v.
JOHN W. DICKINSON.
No. 362.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE QUESTION OF JURISDICTION.

ARGUMENT.

A verdict of guilty was found against this respondent in the District Court for the District of Massachusetts upon an indictment under the national-bank act. He moved in arrest of judgment. The motion raised a constitutional question. It was overruled. He thereupon carried the question, with others relating to pleading and evidence, on error, to the Circuit Court of Appeals. That court took jurisdiction, and, by a divided opinion, determined the constitutional question in his favor and all the others against him, and sent the case back for a new trial.

67069—09——1

The constitutional question involves a most important principle of criminal jurisprudence, and is momentous enough to make it extremely desirable, in the interests of the whole people, that it shall be settled, one way or the other, by this court.

The Government, it is conceded, can not have it reviewed as of *right*. It has, however, obtained a stay of mandate in the Court of Appeals, and has directed your Honors' attention to the question, to the end that, if you should deem it of sufficient importance, you might, of your own motion, exercise that discretionary power which seems to have been vested in you by Congress, to take the whole case out of the Court of Appeals, supersede the jurisdiction of that court, and decide it *de novo*, as if—to use the language of Congress and apply it as it has been applied by this court—it had been brought directly here by the defendant from the District Court. (Sec. 6, Jud. Act, 1891; *The Three Friends*, 166 U. S., 1, 49.)

Your Honors have awarded the writ, and the record is in this court.

I.

Where the language of a statute is explicitly inclusive, as in section 6 of the judiciary act of 1891, exceptions are not to be read into it unless the context clearly demands it to avoid an obvious absurdity or anomaly. This is particularly true of a remedial statute such as this.

II.

The precise question, carefully worded, which this court asked itself in the *Sanges* case, and which only it proceeded to answer, was: Did section 5 of the judiciary act of 1891 confer "upon the United States *the right to sue out a writ of error* in a criminal case?" (p. 311). The emphatic denial, and the only denial, of that case is that the statute gave the United States, as was claimed by the Government, the *right* to bring up a criminal case on writ of error. And this denial is based largely, if not wholly, upon the ground that any other construction would involve a "serious and far-reaching innovation" in the criminal jurisprudence of the United States (p. 323). That is to say, the inference from the language of the court is strong that if there had been exhibited, prior to that decision, any intention on the part of Congress to give to the United States a right of appeal in criminal cases, the court would have construed the statute differently.

The innovation suggested has now, however, been accomplished, and the power of Congress to make it has been sanctioned by this court. (Act of March 2, 1907, 34 Stat., 1246; *Taylor* v. *United States*, 207 U. S., 120, 127; *United States* v. *Bitty*, 208 U. S., 393, 399, 400.) It can no longer be said that a right of appeal in the Government, such as was claimed in the *Sanges* case under section 5, is an idea foreign to the criminal jurisprudence of the United States.

The most that could now be said would be that when the section was drawn, seventeen years ago, *it would have been* a "serious and far-reaching innovation" to give the United States such a right of review, and that it could not then have been assumed to be conferred by implication.

III.

Section 6 of the Court of Appeals act, however, does not involve the same, or a similar, question of statutory construction as that in the *Sanges* case, and to give it literal effect, without reading into it any exception, will not only be the recognition of a power which Congress admittedly possesses, but, we respectfully submit, will not be obnoxious to any principle of the common law or of American jurisprudence.

IV.

The United States, as we have elsewhere urged (original brief, p. 21), is here in no sense demanding review as its right. It is not here even alleging error, certainly not in terms, and, we submit, not in effect. It has merely called the court's attention to a case in which a question of great public importance is raised, and has suggested that, under the powers conferred upon, or reserved in, this court by section 6 of the Court of Appeals act, and in the interests of a uniform and enlightened administration of justice, there should be, if possi-

ble, an authoritative determination of that question, one way or the other, by the only court whose decisions are regarded as controlling precedents in all other courts of the United States.

V.

The *writ of error* is a weapon which the law places within the reach of all persons, and which the legislature may give to the State in a criminal proceeding, to be used at will, whenever appropriate, in the protection or enforcement of rights.

Certiorari, on the other hand, is an instrument entrusted only to the impartial custody and control of a court, to be resorted to by it in its discretion whenever appropriate and necessary to the accomplishment of justice.

VI.

Though the writ of certiorari is not mentioned by name in the Constitution and statutes of the United States prior to the judiciary act of March 3, 1891, the original power to issue the writ was conferred upon this court by the First Congress (Act 1789, c. 20, sec. 14; 1 Stat. 81, which now appears in substance in Revised Statutes, sec. 716). This section gave to the Supreme, Circuit, and District courts "power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

The writ of certiorari, therefore, under our Constitution and statutes is strictly the common-law writ of that name, with all its functions and attributes so far as applicable to our system of jurisprudence. It is defined at common law to be an original writ issuing out of the Court of Chancery or the King's Bench, and directed in the king's name to the judges or officers of inferior courts, commanding them to certify or to return the records of a case pending before them, to the end the party may have a more sure and speedy justice. An examination and comparison of the authorities and the text writers, both English and American, seems to justify the conclusion that the writ, as invoked in this country, has all the attributes and functions which it possessed in England, except, of course, that it is not here, as it was there, a royal prerogative writ (*Ex parte Vallandigham*, 1 Wall., 243, 249).

Nevertheless, having said that this is the writ of certiorari known to the First Congress, and therefore the common-law writ, we may point with some emphasis to the fact that whereas there is little authority showing that the king could have a writ of error in a criminal case (*United States* v. *Sanges*, 144 U. S., 310, 312) there is, on the other hand, no doubt whatever that the writ of certiorari was an instrument constantly used in England in the administration of the criminal law at the instance of the prosecutor, and apparently not alone, because it was the "prerogative of the king."

Blackstone uses the word "prosecutor" and not "king" in this connection, saying (Vol. IV, p. 321): "A *certiorari* may be granted at the instance of either the prosecutor or the defendant; the former as a matter of right, the latter as a matter of discretion." In other words, the use of certiorari, at the instance of the state, in the enforcement of the criminal law, was not only not foreign to the law of England in 1789, but was one of its normal, and almost essential, incidents.

Among its other attributes, as stated in *Groenvelt* v. *Burwell* (1 Ld. Raym., 464, 469, cited in our original brief), it lies in all judicial proceedings in which a writ of error does not lie. And, in the case at bar, a writ of error does not lie at the suit of the United States or of the defendant, from this court to the Court of Appeals. In the case last cited, it is further said that "It is a consequence of all jurisdictions to have their proceedings returnable here (to the Court of King's Bench) by certiorari, to be examined here * * *. Where any court is erected by statute, a certiorari lies to it" (p. 469).

The analogy between the powers of this court and those of the Court of King's Bench, as it existed prior to 1789, was earliest and most fully drawn by Chief Justice Marshall in *ex parte Crane*, *Pet'r* (5 Pet., 190, 192, *seq.*), in which, after quoting Blackstone for the statement that it is the peculiar business of the "Court of King's Bench to superintend all other inferior tribunals,

and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them", the Chief Justice goes on to say that in the United States the Supreme Court "exercises both common-law and chancery powers; is invested with appellate power; and *exercises extensive control over all the courts of the United States.*"

Since that decision, the analogy between the powers of the two courts, and particularly the power of each to issue this particular writ, has been the subject of frequent allusion. (*Ex parte Vallandigham*, 1 Wall., 243; *American Construction Company* v. *Jacksonville Railway*, 148 U. S., 372, 380; *In re Chetwood, Pet'r*, 165, U. S., 443, 462.)

These suggestions will not, we trust, seem to the court irrelevant here. They are designed merely to indicate that, prior to the judiciary act of 1891, this court had inherited the power of the Court of King's Bench to issue the common-law writ of certiorari to all inferior courts as an original process "in furtherance of justice," and that when the Congress of 1789 clothed this court with that power, it must be presumed to have had in mind that it was then one of the principal attributes of that writ, unlike the writ of error, that it was awarded to the prosecutor in criminal cases; in other words, that as a process invoked by the state in the accomplishment of justice, it was well known in common-law criminal jurisprudence.

VII.

We come now to a consideration of the statute in which this writ, with these same attributes and functions, is first expressly mentioned in federal legislation, namely, the statute under which this petition was brought, section 6 of the judiciary act of 1891. That section must, of course, be construed in the light of the judiciary act of 1789 and of the common law. And the considerations to which we have just referred, so far as they may be thought to have force, are to be borne in mind in interpreting it.

Assuming, however, that this court did not possess authority under the act of 1789 to review a criminal case on certiorari on the application of the Government, there is no longer any question, as we have already pointed out, that Congress has the power to grant it such authority. There is no doubt that it may invest this court with jurisdiction "to require by certiorari or otherwise *any* such case" [made final in the Circuit Court of Appeals] to be certified to it for its review.

Here then we have legislative authority to confer broad and salutary remedial power, and apt language to confer it.

VIII.

While this is not the first time that the Government has called this court's attention to a criminal case in which a question raised seemed

to be of sufficient gravity and importance to justify the court in exercising its authority by certiorari, the occasions for it have rarely arisen. Such application was made in 1904, in the case of *United States* v. *Cadarr* (197 U. S., 475), where the writ was issued to the Court of Appeals for the District of Columbia, and the case reviewed, the jurisdictional question being passed *sub silentio;* and again, at the October term, 1906, in the case of *United States* v. *Morgan* (203 U. S., 595), where the application was denied upon grounds not stated. In neither of these cases was a constitutional question raised.

It would not be fair, however, to assume from the small number of these applications that the United States has practically construed the act of 1891—whatever may be inferred from its attitude toward the act of 1789—as if it did not confer upon this court authority to review a case like that at bar on certiorari on the application of the Government. The reasons why such a conclusion would not be warranted are not far to seek. In the first place, criminal cases raising questions of great national or general importance, are of rare occurrence. Moreover, it is generally conceded, and the Government has acted upon that belief, that, except for the determination of a question of an unusually momentous nature such as does not often arise, this extraordinary remedy should not be invoked. But there are still other obvious reasons why

the Government has not been obliged to importune this court with such applications: In the great majority of such cases—indeed, in praticcally all of them—the question is likely to be, as in the case at bar, a new question of constitutional construction or application, of which appellate jurisdiction is given to this court direct from the trial court. It is notoriously rare—almost never, fortunately—that a district or circuit court, or even a court of appeals, assumes to pass upon such a question adversely to its constitutionality. In almost all cases, the question has been carried directly from the trial court to this court under section 5 of the judiciary act.

In the comparatively few cases involving such a question which, since 1891, have gone on error to a circuit court of appeals, that court has almost invariably—and very properly and wisely in the interests of uniform and authoritative decision—either declined jurisdiction entirely, or certified the question to this court under section 6 of the act. It has been seldom, indeed, that a court of appeals has undertaken to pass finally upon a novel constitutional question—certainly one of such deep and far-reaching importance as the one raised on this record. While we do not suggest that there was any impropriety in the assumption of jurisdiction in this case by the Court of Appeals, we respectfully submit that the usual, and by far the better course for the court to pursue in such a

case, involving such a question, is to certify it, particularly where, as in this case, there was a division of opinion in the court; where, as in this case, the opinion of the majority was directly at variance with that of so eminent a judge as Chief Justice Shaw, and with the almost universal practice throughout the country; and where, too, as in this case, that decision, if it is to stand, will be most unfortunate in its effects upon criminal procedure in the circuit in which it was promulgated, and upsets the law and practice, long acquiesced in, in most, if not all, the States of the Union, as to an offense of the class for which the respondent was indicted.

It was only after the United States had requested the Court of Appeals for the First Circuit to certify this unusually important question, and that court had declined to do so, that recourse was had, as a last resort, to these proceedings.

We are not aware that any such request made to a divided court has ever before been refused during the seventeen years that courts of appeal have been in existence. In other words, we have no reason to doubt that this is the first time since the establishment of circuit courts of appeal that the United States has had any occasion to ask this court to exercise its authority by certiorari under section 6 of the judiciary act of 1891 in a criminal case involving a constitutional question. This being so, we ought to feel assured that your honors will not conclude that any infer-

ence is to be drawn adverse to our contention as to the court's power in this case from the fact that applications by the Government for certiorari in criminal cases have hitherto been conspicuously few.

But are we considering here a provision of statute as to which the argument of practical construction from non-user is applicable? It is not a provision peculiarly for the use and benefit of the United States, or its Department of Justice, any more than for any other party litigant. It is not, as we have already attempted to emphasize in another place in this discussion, a right conferred upon the United States, that is in question here, but the power of this court of its own motion to issue certiorari in *all* cases made final in circuit courts of appeal, in any circumstances, at any stage, and at the suggestion of any party, if only the public interests seem to demand the interposition of that power. Can this court be divested of its authority to use this writ in furtherance of criminal justice merely because from lack of fitting opportunity it has not been frequently invoked for that particular purpose?

If we are justified in urging, as we have repeatedly done in the course of this argument, that power was given to this court to issue certiorari under the judiciary act of 1891, not primarily in order that it might be invoked in the interests or for the benefit of the parties litigant in a suit, but in the attainment of justice for the welfare of

the people, that questions of "public and national importance" should be properly and authoritatively determined, there would seem to be little doubt as to the way in which the court will answer this question. Indeed the court has so frequently held in substance that neither the fact that the determination of a particular case is of vital importance to the private interests of a party seeking the writ nor that private property of very large value is involved in the case is sufficient to justify the issuing of the writ, that the question seems to be already answered. It is the public importance of the question raised, not the individual interests involved, which calls for intervention by the extraordinary remedial power.

Basing its contention upon the foregoing considerations and the others contained in the brief, the Government hopes to have demonstrated with regard to the writ of certiorari and the authority of this court to issue it at the suggestion of the United States in a criminal case under the circumstances at bar.

(1) That prior to the act of 1891 this court had the same authority, though infrequently exercised, to issue the writ to inferior courts that was possessed by the Court of King's Bench, and that the writ possessed the functions and attributes of the common-law writ; (2) that one of those attributes was that it was issued at the instance of the prosecutor in the administration of criminal justice, although it was never, perhaps, in this country,

claimed to be the prerogative of the State as it was, in England, of the King; (3) that it could not be said, therefore, even prior to 1891, that the suggestion that it be so used in any case would be an anomally or innovation, as has been said of writs of error; (4) that if it could be properly said that a close analogy exists between a writ of error and a writ of certiorari, the innovation which was the ground of the construction put upon section 5 in the *Sanges* case has now at last been accomplished, and the right of appeal by the United States in criminal cases recognized and affirmed; (5) that Congress clearly had the power to give this court authority to issue a writ of certiorari in all cases made final in the Circuit Court of Appeals, including a case like that at bar; (6) that it has, in terms, given this court such power "in any case," by section 6 of the judiciary act, which, being a remedial statute and a statute conferring power upon the court in the interests of the public, must be liberally construed, as liberally as the court has construed it in *Forsyth* v. *Hammond* (166 U. S., 506, 512-14); (7) that it must not be lost sight of that what we are discussing here relates to the broad supervisory power of this court, affirmed in 1831, in *Ex parte Crane*, over the whole field of federal jurisprudence, and not to a right of a party litigant, whether plaintiff or defendant, whether prosecutor or accused; (8) that the occasion for exercising or invoking it in criminal cases is not

frequent, and that the United States, at least since the act of 1891, has had little opportunity to do so; and (9) that even if this were not so, in view of the purposes of the act, such neglect should have no significance in construction.

CHARLES J. BONAPARTE,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.
ASA P. FRENCH,
United States Attorney.

APPENDIX.

ACT OF MARCH 3, 1891, SECTIONS 5 AND 6 (26 STAT., 827–828).

SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final

decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

ACT OF MARCH 2, 1907 (34 STAT., 1246).

CHAP. 2564.—An Act Providing for writs of error in certain instances in criminal cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the validity, or construction of the statute upon which the indictment is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The writ of error in all such cases shall be taken within thirty days after the decision or judgment

has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.

O

Supreme Court of the United States.

October Term, 1907. No. 736.

UNITED STATES,
Petitioner,
v.
JOHN W. DICKINSON,
Respondent.

Office Supreme Court, U. S.
FILED,
APR 27 1908
JAMES H. McKENNEY,
Clerk.

In Petition for Writ of Certiorari.

BRIEF FOR THE RESPONDENT.

FRANK W. HACKETT,
POWERS & HALL,
Attys. for Respondent.

Judd & Detweiler, Printers, 727 Colorado Building,
Washington, D. C.
1908.

Supreme Court of the United States.

UNITED STATES,

PETITIONER,

v.

JOHN W. DICKINSON,

RESPONDENT.

In Petition for Writ of Certiorari.

BRIEF FOR THE RESPONDENT.

STATEMENT OF FACTS.

The respondent Dickinson and one Foster were jointly indicted under Section 5209 of the Revised Statutes, which is a part of the National Bank Act. The material portion of this section is as follows:—

> Every president, director, *cashier*, teller, clerk, or agent of any association who embezzles, abstracts, or *wilfully misapplies* any of the moneys, funds, or credits of the association . . . with intent, in either case, to injure or defraud the association; . . . *and every person who, with like intent, aids or abets* any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

Foster, the principal defendant, was cashier of the South Danvers National Bank, and was charged with wilfully

misapplying the funds of the bank, and Dickinson was charged with aiding and abetting. Both having been convicted, Dickinson sued out a writ of error, and after very full argument before the Circuit Court of Appeals for the First Circuit, his conviction was held invalid by that court by reason of the fact that the verdict against him was found by a jury of only ten men.

The facts are thus stated in the opinion of the Circuit Court of Appeals (Record, p. 225):—

> The full jury of twelve was empanelled and the trial commenced. While it was proceeding it appeared that one of the jurors, by reason of illness, was unable to sit further, whereupon the following agreement was filed of record:—
>
> > Whereas one of the jurors impanelled to try the above-entitled indictment is unable by reason of illness to further sit therein,
> >
> > Now, therefore, we consent and agree that the said juror, to wit, Charles F. Low, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining eleven jurors with the same force and effect as if said juror had not been discharged.
> >
> > JOHN W. DICKINSON.
> > GEORGE M. FOSTER.
> > UNITED STATES,
> > *by* BOYD B. JONES,
> > *Special Assistant U. S. Attorney.*
>
> The court proceeded with the trial with the remaining eleven jurors. Subsequently, the trial being still unfinished, death occurred in the family of one of them, and another like agreement was filed of record as to him. The trial proceeded with the remaining ten jurors, who returned a verdict, subsequently to which a motion in arrest of judgment was filed as follows, and overruled:—
>
> > And now, after verdict against the said John W. Dickinson, and before sentence, comes the said John W. Dickinson, by his attorneys, and moves the court here to arrest judgment herein and not pronounce the same, because of manifest errors in the record appearing, to wit: Because the said verdict against the said John W. Dickinson was found by a so-called jury consisting

of ten (10) jurors only, and not by a jury of twelve (12) jurors, as required by the Constitution and laws of the United States, and because no judgment against him, the said John W. Dickinson, can be lawfully rendered on said verdict.

POWERS & HALL,

Attorneys for the said Defendant.

It is the question thus raised which the United States by its petition for *certiorari* asks this court to review.

Definition of the Question on which Review is Sought.

The statement of the question involved which is found on the opening page of the petition is so worded as to indicate a radical misconception of the grounds on which the argument for the respondent before the Circuit Court of Appeals and the opinion of that court alike proceeded. The petition states the question to be whether the respondent, under substantially the circumstances above outlined, "can have judgment against him arrested on the ground that he has been deprived of a constitutional right which he could not waive." (Petition, p. 1.) The misconception indicated by this mode of expression requires to be corrected at the outset, as an accurate statement of the question will in itself go far toward answering the contentions advanced by the government in its petition and brief.

The objection to the verdict and to the judgment rendered thereon was based on the second section of Article III of the United States Constitution, which provides that "*the trial of all crimes*, except in cases of impeachment, *shall be by jury*," and the fundamental question is whether this provision merely guarantees a right to the defendant for his own benefit, or whether it is a part of the frame of government, an authoritative definition of the only form of procedure by which under the Constitution indictments for crime can be tried and determined. In the former case the principle might very naturally apply which as a general

rule permits a party to waive any right created solely for his benefit. In the latter case the language of waiver would have no application whatever, the defendant and the district attorney having no more power than any other individuals to give legal effect to a form of procedure wholly unauthorized by the Constitution. Under such a construction a trial by consent of the parties without a constitutional jury would be, in the language of Judge Cooley, only a species of arbitration (Cooley's Constitutional Limitations, 7th ed., pp. 458–459), and a sentence of imprisonment based on such a trial could no more be squared with the Constitution on the ground of waiver than if instead of a judge and ten jurors the parties had agreed to leave the matter to the determination of three arbitrators, or to decide it by throwing dice.

This distinction between a guaranty of a personal right and a governmental regulation is very clearly stated by the Circuit Court of Appeals as the ground of its decision.

> On the other hand, the provisions of section two of Article III. are peremptory in form, and point out absolutely the tribunal which must dispose of the crimes to which they refer. They cover nothing except what concerns the public interests, as well as personal liberty. The Article in unqualified terms establishes the tribunal. Inasmuch as the public, as well as the persons charged, have always an interest in what tribunal shall dispose of prosecutions for high crimes, it would appear *prima facie* that no prosecuting officer nor any person accused, whether acting separately or by agreement, can substitute another locality or another tribunal for that which the letter of the Constitution designates.
>
> The tribunal pointed out by Article III. consists of a jury, and, by necessary implication, of a court established under the Constitution and the laws, with a judge or judges appointed also according to the Constitution and the laws to preside therein. We have said that there is no authoritative determination with reference to the topic before us; but the jury to be empanelled for a criminal cause within the meaning of the Constitution has been directly and authoritatively determined in *Thompson* v. *Utah*, 170 U. S. 343, to consist of twelve. With the aid of this determination, the third Article points out perfectly the elements of the tribunal authorized to proceed against persons accused of crimes like that before us, including

equally the court, the judge and the jury, and the number composing the jury. Has any one other than the makers of the Constitution, or those authorized to amend it, the power to substitute for what is thus declared? No one has ever conceived an affirmative answer as to the court or judge; and the apparent answer as to the jury would also be in the negative. (Record, p. 228.)

The question is not therefore whether the defendant could waive a constitutional right guaranteed to him personally, but whether the constitutional provision is not of such a character that any agreement between the parties for a different tribunal from that provided by the Constitution is necessarily without legal effect, and therefore immaterial.

ARGUMENT.

The "special reasons why *certiorari* should issue" enumerated in the petition (p. 6) fall into three groups and will be so examined.

A. THE IMPORTANCE AND ALLEGED NOVELTY OF THE QUESTION.

The first three grounds relied on in the petition are as follows:—

1. This case involves a constitutional question, the importance and far-reaching effect of which can not be easily exaggerated.
2. The question, it is conceded, has never been passed upon by this court.
3. The occasion for application of the principle contended for by the United States is of frequent occurrence in the trial of criminal cases, and the denial of that principle absolutely prevents the Government and a defendant from entering into a stipulation, even in the case of a misdemeanor, which would oftentimes save great expense to both parties and great loss of time to the court.

Of these three propositions the respondent takes issue chiefly with the second one. The first and third are expressed so strongly, however, that they cannot be dismissed

without a brief word of comment. It is of course assumed that in discussing the importance of the question here involved the government refers to its general importance rather than to its effect on the particular case. From this point of view the respondent suggests, without any desire to quibble over words, that "the importance and far-reaching effect" of the question can be exaggerated and have been somewhat exaggerated by counsel for the United States. It would be easy to think of a great many constitutional questions whose decision has involved or would involve a much more important and far-reaching effect than the decision of the question raised in the present case.

Some such exaggeration appears in the third proposition, which is perhaps best answered by reference to a fact which the petition itself recognizes and relies on. If a distinction is to be drawn between cases in which the trial started with a full jury and cases in which there was not a full jury at any stage (and the whole argument of the petition is based on such a distinction), then it appears that the question here involved has never before in over a century of criminal administration required the determination of any federal court.

For the purposes of the argument the respondent concedes that the question is of sufficient practical importance so that, if the existing decisions of this court threw no light upon it, a review of the present case might well be justified,—if only for the purpose of reaffirming with conclusive authority the decision of the Circuit Court of Appeals. If, however, that decision merely follows prior decisions of this court, the grounds of which, being fully set forth in the opinions, are plainly applicable to the case at bar, the respondent submits that this case is not of such far-reaching importance, nor the precise situation of such every-day occurrence, as to require that this court exercise its extraordinary jurisdiction by *certiorari* in order merely to reaffirm previous decisions and to deny the validity of unsubstantial distinctions.

This brings us back to the second ground stated in the petition, which is to the effect that "the question, it is conceded, has never been passed upon by this court." The respondent recognizes this as the fundamental ground of the petition, and by no means concedes the proposition stated without important qualifications. On the contrary, the respondent contends that all the questions necessary to be decided in order to determine the validity of the verdict in the present case have already been decided by this court, and that the distinction by which it is sought to take the case outside the scope of those decisions appears on the briefest examination to be untenable.

The decision of the Circuit Court of Appeals was based upon the provision of Article III of the Constitution, to the effect that "the trial of all crimes shall be by jury," and may be resolved into the following propositions:—

1. Article III is an absolute definition of the only tribunal before which indictments for offences within its terms can be legally tried and determined.

2. The offences within its terms, defined by the words "all crimes," include the offence charged in the case at bar, and the trial of that offence was, therefore, subject to the constitutional requirement.

3. The jury required is a jury of twelve.

4. The constitutional requirement is not satisfied unless there is a legally constituted tribunal not merely at the beginning, but throughout the entire trial. If the verdict is not rendered by a constitutional jury, the defect is not cured by the fact that a constitutional jury heard a portion of the evidence.

The first three propositions are covered by express decisions of this court, and, so far as they relate to the beginning of the trial, they are in effect conceded by the government, leaving the fourth proposition as the only one in dispute. This appears from the following statement on page 9 of the petition:—

The Government did not contend that a defendant could, before his trial, agree that the tribunal before which he was to be put upon trial should be made up of a judge and less than twelve jurors, *because the defendant would then be consenting to the creation of something which was not a court.* What the Government contended was, that if, on the other hand, jurisdiction over the trial is obtained by the organization of a constitutional court, and the court so constituted is subsequently diminished, with the defendant's consent, by one or two jurors, the trial may proceed and a lawful verdict be taken from the jury which has in this way suffered a "fractional loss."

With all deference to the conclusions of the majority of the learned judges of the Circuit Court of Appeals, it is submitted that the error of their opinion lies in the fact that it makes no distinction between an agreement on the part of the defendant to be tried *by an illegally constituted tribunal—that is to say, one originally made up in a manner contrary to the requirements of law*—and an agreement, after the tribunal has been in all respects legally constituted, to assent to that which, in the apt language of Mr. Justice Holmes in *Interstate Consolidated Street Railway Company* v. *Massachusetts* (207 U. S. 79), may be termed a "fractional loss."

It is evident that the distinction on which the government thus places its sole reliance can be maintained only by showing that the reasons which, as conceded by the government, imperatively require a full jury at the outset, become inapplicable when the number is diminished at a later stage of the proceeding. What these reasons are will appear most clearly by examination of the decisions by which the first three of the above propositions are established.

1. Article III is an absolute definition of the only legal tribunal.

The distinction between a guaranty of a personal right and what is called in

Schick v. *United States*, 195 U. S. 65, 72,

a "constitutional or statutory mandate" has frequently been recognized by this court. For example, in

Ex parte Bain, 121 U. S. 1, 12–13,

it was held that the provision of the Fifth Amendment, requiring an indictment by the grand jury in case of infamous crimes, though found in that part of the Constitution regarded in general as in the nature of a bill of rights, nevertheless defines a condition "indispensable to the power of the court" to try the prisoner.

Cf. *Ex parte McClusky*, 40 Fed. 71, accord.

So in

Hopt v. *Utah*, 110 U. S. 574, 579,

the court decided that

> it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. . . . If he be deprived of his life or liberty without being so present such deprivation would be without that due process of law required by the Constitution.

That the requirement of jury trial in Article III of the Constitution is of this imperative character was expressly decided in

Thompson v. *Utah*, 170 U. S. 343,

where the court said (page 353):—

> It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.

It is settled therefore by express decision of this court that Article III belongs to the class of imperative constitutional mandates which cannot be modified by any agreement between the prosecuting officer and the accused.

2. The offence in the case at bar is within the constitutional provision.

Thompson v. *Utah* was a case of felony, but it is settled by other decisions and is not now questioned by the government that Article III applies equally to serious misdemeanors, in fact to all except

> a class of petty or minor offenses, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury.
>
> *Callan* v. *Wilson*, 127 U. S. 540, 555.

On page 549 of the same case the court says:—

> It is not to be construed as relating only to felonies, or offences punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a "crime" within the meaning of the third article, or a "criminal prosecution" within the meaning of the Sixth Amendment.

Examples of such petty offences are found in

> *Natal* v. *Louisiana*, 139 U. S. 621.
> *Schick* v. *United States*, 195 U. S. 65.

The offence in the present case is punishable by ten years' imprisonment, which under section 5541 of the Revised Statutes may be in the penitentiary. It is an infamous crime under the Fifth Amendment.

> *Ex parte Wilson*, 114 U. S. 417.

It is in all respects a more serious offence than the misdemeanor involved in *Callan* v. *Wilson*, and is certainly not a petty offence within the language of that case and the *Schick* case.

The offence being thus determined to be a "crime"

within Article III, the construction of that article in *Thompson* v. *Utah*, as an imperative mandate requiring a jury of twelve to give any validity to the proceedings, necessarily applies to the present case with full force. Article III can hardly be an absolute mandate as to part of the "crimes" to which it refers, and a guaranty of a personal privilege as to the rest. Accordingly, it is clearly recognized in the *Schick* case that once an offence, whether felony or misdemeanor, is brought within the definition of "all crimes" in Article III, no waiver of the terms of that provision can be effective, and the greater part of the opinion is occupied with a discussion of the question whether the offence there involved was within the scope of that article. What is there said of waiver of the *right* of jury trial guaranteed by the Sixth Amendment is carefully limited on page 72 to cases "where there is no constitutional or statutory mandate . . . prohibiting,"—in other words, to those petty offences which are held not to be within the terms of Article III.

3. The jury must be a jury of twelve.

That the jury required by Article III is a jury of twelve is authoritatively determined, upon grounds stated at length in the opinion, by the case of

Thompson v. *Utah*, 170 U. S. 343 (above cited).

It thus appears, as stated above, that, so far as the decision of the Circuit Court of Appeals involved the first three propositions above enumerated on page 7, it merely followed existing decisions of this court. To escape the effect of those decisions, and to support the contention that the question has never been passed upon by this court, the petition relies entirely on the alleged distinction between a trial beginning without a full jury or with no jury at all, and a trial in which a jury originally complete is later diminished in number.

The fourth proposition involved in the decision of the Circuit Court of Appeals, and the one with which the government thus takes issue, must now be considered.

4. The constitutional requirement is not satisfied unless there is a legally constituted tribunal not merely at the beginning, but throughout the entire trial.

It is true that no case has come before this court in which the facts presented precisely this question. It therefore remains to inquire whether the distinction relied on by the government can be supported on any logical ground, and whether, to adopt a phrase from the petition, less is necessary to *constitute a court* when the verdict is rendered than when the district attorney rises to make his opening statement.

It is believed that, in attempting to draw the distinction above stated, counsel for the United States were under the influence of the same misconception of the question at issue which was pointed out at the beginning of this brief, and were misled by a resulting failure to distinguish between cases arising under the United States Constitution as construed by this court, and such cases as

Commonwealth v. *Dailey*, 12 Cushing, 80,

which is cited in their petition and brief. That case arose under a provision of the Massachusetts Constitution very differently worded from Article III of the Constitution of the United States, and proceeded distinctly on the ground that the Massachusetts provision is "*lex pro se introducta*," a guaranty of a personal privilege, like many of the amendments to the United States Constitution, including, as shown by the *Schick* case, the Sixth Amendment. It necessarily follows from this construction of the Massachusetts provision, that there is no *constitutional prohibition* against a criminal trial in the courts of that state with less than twelve jurors by consent of the defendant, and this is equally

true whether the trial starts with less than that number or a jury originally composed of twelve is subsequently diminished.

Cf. *Jones* v. *Robbins*, 8 Gray, 329, 341.

The objection intimated by Chief Justice Shaw, on page 83 of the opinion in the *Dailey* case, to permitting a trial with less than twelve by consent "unless upon some unforeseen or urgent exigency," was evidently based on considerations of public policy and a natural desire to discourage too easy or frequent a departure from established and time-honored forms. He therefore suggested that the whole matter would be regulated by the discretion of the presiding judge,—a suggestion obviously incompatible with an imperative constitutional requirement. Under the construction thus applied by the Massachusetts court to the state constitution, a distinction such as the government seeks to draw in the present case would be logical, simply because the whole question is treated as one of discretion, and there would ordinarily be no occasion for the exercise of such discretion at the outset of the trial.

Under the Massachusetts doctrine, therefore, the constitutional objection to a reduction of the number of jurors by consent is *entirely eliminated*, on the ground that the constitution merely secures a personal right which can be waived; and the distinction (if any is intended to be suggested) between such reduction in the number at the beginning and a similar reduction at a later stage must be understood to rest on considerations altogether independent of any constitutional prohibition.

But the situation under Article III of the Federal Constitution is entirely different. That article being construed as an absolute constitutional mandate prescribing the only tribunal before which an indictment for crime can legally be tried, it cannot be eliminated from the case by any wish or consent of the defendant, and it goes almost without saying that the defendant and the district attorney cannot any more

effectively amend the Constitution at one stage of the trial than at another.

The distinction which the government asserts must be supported, if at all, on a ground which satisfies, rather than dispenses with, the imperative requirement of trial by jury. There would be one possible ground on which, if there were any historical basis for it, such a result might be reached. If there had been under the common law of England, or perhaps that of Massachusetts before the adoption of the Federal Constitution, a practice by which the discharging of one or more jurors by consent in the course of the trial was one of the incidents of the common law trial by jury, it would be logical and in harmony with established principles of constitutional construction to hold that such a practice is a part of the definition of trial by jury as those words are used in the Constitution. A verdict rendered under such circumstances by less than twelve jurors would then be supported, not because the requirement of Article III had been waived by the defendant, but because the defendant would have had a jury trial within the meaning of that article. But all the industry and learning of counsel on both sides of this case and of the judges of the Circuit Court of Appeals has failed to discover any trace of such a common law practice.

The definition of a jury in *Thompson* v. *Utah*, as necessarily composed of twelve men, must therefore stand without qualification, and there is no other possible ground on which it can be held that the Constitution absolutely requires such a tribunal at the beginning of the trial and does not equally require it at the time of verdict. The constitutional provision is as much a part of the frame of government at the end of a trial as at the beginning. The petition admits that a tribunal originally composed of a judge and less than twelve jurors would not be a court. But there is equal necessity for a court when the verdict is rendered. The language of

Callan v. *Wilson*, 127 U. S. 540, 557,

is fully applicable to the present case,—"a judgment of conviction not based upon a *verdict of guilty by a jury* is void."

The government's position receives no support from any of the state court decisions on the question. There are several states in which a verdict is held valid when one of the jurors has been excused by consent in the course of the trial. See for example

State v. *Sackett*, 39 Minn. 69.
State v. *Kaufman*, 51 Iowa, 578.
Cf. *State* v. *Ellis*, 22 Wash. 129.

But in all these cases, as in *Commonwealth* v. *Dailey*, the decision proceeds on the ground that the provision of the state constitution is merely a guaranty of a personal right.

On the other hand, wherever the constitutional provision has been held to be an imperative definition of the only legal mode of procedure, waiver or consent has been held ineffectual to modify the rule at any stage of the trial.

Cancemi v. *People*, 18 N. Y. 128.
People v. *O'Neil*, 48 Cal. 257.
State v. *Mansfield*, 41 Mo. 470.
State v. *Simons*, 61 Kan. 752.
State v. *Scruggs*, 115 N. C. 805.

The respondent is not aware that the distinction relied on by the government has ever been even suggested in any case where the constitutional requirement was thus construed as an absolute provision of the frame of government. After an elaborate and thorough examination of the authorities on the whole subject the Circuit Court of Appeals dealt with this point in its opinion in this case as follows:—

It will be noticed that the trial commenced with the constitutional tribunal; that is, a court organized under the Constitution and laws of the United States, with authority to try the offence in question, and a judge of that court duly appointed and commissioned, and authorized to preside at the trial, and a constitutional jury. The difficulty arose subsequently. We refer to these facts so that it may be understood

that we do not overlook them, although neither party has made any distinction between a case where the full jury is first empanelled and jurors are subsequently withdrawn with consent of one, and where, with like consent, the jury was from the beginning deficient in numbers. We are not aware that any court or text writer has ever made any distinction on this score, and we will not attempt one. (Record, pp. 225–226.)

The language of Mr. Justice Holmes in

Interstate Consolidated St. Ry. Co. v. *Massachusetts*, 207 U. S. 79, 87,

quoted both in the petition (p. 9) and in the dissenting opinion of Judge Aldrich (Record, p. 237), cannot be perverted to cover such a case. The learned justice was there dealing with personal rights guaranteed by the Constitution, and expressed in new and apt language the established doctrine that certain of the broadest of such rights are given subject to certain implied qualifications, necessary for the public weal, and founded upon ancient understanding and practice under the common law. Once more it must be pointed out that we are dealing in the present case not with a personal right guaranteed by the Constitution, but with a part of the frame of government. Moreover, to quote another phrase from the same opinion, both the decision of the Circuit Court of Appeals and the authorities in this court which that decision followed are in harmony and not in conflict with "the traditions and habits of centuries."

The respondent therefore submits that the decision of the Circuit Court of Appeals in the case at bar represents merely the direct application to a new case of principles clearly settled by existing decisions of this court, and that the grounds of the former decisions leave no room whatever for the distinction on which the government places its sole reliance in the present case. Having once clearly and fully enunciated the principle which governs a particular class of cases, the Supreme Court can hardly be expected to issue successive writs of *certiorari* merely to apply that principle

to every case presenting such a difference in its facts as bears no relation to the foundation of the principle.

B. THE ALLEGED CONFLICT BETWEEN THE DECISION OF THE CIRCUIT COURT OF APPEALS AND DECISIONS OF STATE COURTS.

The fourth and fifth grounds assigned in the petition for the issue of the writ are as follows:—

> 4. The majority opinion of the Circuit Court of Appeals is directly contrary to the law of Massachusetts as laid down by Chief Justice Shaw. (*Commonwealth* v. *Dailey*, 12 Cush. 80.)
>
> 5. It overrides the uniform practice in Massachusetts, Maine, and New Hampshire, and which, it is believed, prevails generally throughout the United States.

These propositions are evidently framed in the endeavor to bring the case within the following language, which was used by this court, in speaking of the power to issue writs of *certiorari*, in

Forsyth v. *Hammond*, 166 U. S. 506, 514–515:—

> It is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, *the necessity of avoiding conflict* between two or more Courts of Appeal, or *between Courts of Appeal and the courts of a State*, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.

The sort of conflict between the Circuit Court of Appeals and the courts of a state which is there referred to is of course a conflict on some question of substantive law, which may come for decision before either the state court or the federal court according to the citizenship of the parties and other circumstance affecting their choice of tribunal. A conflict on such a question necessarily creates confusion and doubt as to legal rights, since those rights will be differently

administered, and the same transaction will have different legal effects, according to the court before which the question is brought for determination. But no such doubt or confusion arises out of a difference of decision on a question purely of procedure. It is only in civil cases at common law that any attempt is made to conform federal practice to the practice of the states, and there are many rules in regard to the conduct of criminal trials in the United States courts which differ from the corresponding rules in force in the courts of the states. Even if, therefore, the decision of the Circuit Court of Appeals in this case were necessarily inconsistent with the decision of the Massachusetts court in *Commonwealth* v. *Dailey* above referred to, this would furnish no ground for the intervention of the Supreme Court by *certiorari*.

In fact, however, there is no necessary inconsistency. The two decisions construed entirely distinct constitutional provisions, expressed in very different language, and the fact that different results were reached involves no more conflict than the decision in

Schick v. *United States*, 195 U. S. 65 (above cited),

that, while Article III is an imperative and mandatory requirement, the Sixth Amendment is merely a guaranty of a personal privilege.

A similar answer may be made to the government's fifth proposition above quoted. The decision of the Circuit Court of Appeals in this case does not "override" the practice in any state of the Union. It has nothing to do with the practice adopted in the various states under their variously worded constitutional provisions. It merely construes, in accordance with previous decisions of this court, a clause in the United States Constitution which has no relation to the practice of the state courts.

It may be added that the state courts are very nearly evenly divided, in the interpretation of their several constitutional provisions as to jury trial, between the construction which treats the constitutional provision as a guaranty of a personal

right and that which treats it as an imperative definition of the only legal mode of procedure. (See, for example, cases cited above on page 15.)

It may also be remarked, in passing, that no constitutional provision expressed in such mandatory language as that found in Article III of the Federal Constitution has ever been held to create merely a personal right, or to be subject in any way to waiver by the accused.

C. MISCELLANEOUS GROUNDS ALLEGED IN THE PETITION.

The remaining grounds stated in the petition for the intervention of this court are as follows:—

> 6. The question is vital to the case at bar, for if the decision of the Court of Appeals stands, it will, though not a final judgment, result—because of lapse of time and loss of evidence which preclude the possibility of another trial—in the escape of the defendant from the consequences of a serious offense of which, after a three months' trial, ten men, by whose decision he agreed to abide, have found him guilty.
>
> 7. It is also, perhaps, not unworthy of consideration that the decision of the majority of the court incidentally allows the defendant to profit by conduct which, measured by ordinary standards, was a deliberate breach of good faith on his part toward the court and toward the Government.
>
> 8. Of the four judges who have already passed upon the question, including the trial judge, two (Lowell, circuit judge, and Aldrich, district judge) have upheld the contention of the Government.

The respondent is in some doubt as to how far the action of this court on petition for *certiorari* will be influenced by considerations which are important only with reference to the particular case.

Passing over this point, however, there is nothing in the government's sixth and seventh propositions which requires elaborate answer.

If it be true, as the government asserts, that lapse of time

and loss of evidence have affected the possibility of another trial, that danger is one which the prosecuting officer should have considered before he attempted by agreement with the defendant to set up a tribunal unauthorized by the Constitution.

Since the government in its sixth proposition has gone outside the record, the respondent takes the same privilege. The length of time which elapsed between the verdict (rendered March 20, 1903) and the decision of the Circuit Court of Appeals was not the fault of the respondent. Although the evidence in the case was extremely voluminous and complicated, and new counsel came into the case in the May after the trial, the respondent's bill of exceptions was filed on July 27, 1903. The final settlement of the exceptions was delayed for some three years, without any fault of the respondent or his counsel, by repeated changes, through death and resignation, in the office of the district attorney, and the difficulty found by new incumbents of that office in giving the necessary amount of time to the case. During all this time the intention of counsel for the respondent to file a motion in arrest of judgment on the ground of the invalidity of the verdict was known to the district attorney's office. The delay was wholly unwelcome to the defendant, and the difficulty over the settlement of the exceptions was finally met by counsel for the defendant voluntarily undertaking the task of redrawing the bill of exceptions in conformity with certain suggestions of the government's attorneys, which the latter had never found time to put into concrete form.

After the present district attorney took office, the case was pushed to a hearing as rapidly as both parties could prepare for it.

The emphasis which the government attaches to the possibility that the respondent may not serve a sentence for an alleged offence of which he has never yet been legally convicted, is difficult to reconcile with the course the government has adopted toward his co-defendant Foster, the principal

defendant on whose guilt the guilt of Dickinson necessarily depended. Foster was tried jointly with Dickinson, and was found guilty five years ago under the same circumstances by the same verdict of ten jurors to which the government now attaches such significance and on which Dickinson was sentenced. Foster filed no exceptions and sued out no writ of error, but he has never been called for sentence, nor his bail renewed, and it is evident that the prosecution against him has been abandoned.

The government's seventh proposition, so far as it is material at all, is only an attempt to argue in another form that Article III ought not to be given the peremptory effect which its language requires and which the decisions of this court have given it.

The morality of the defendant's course in raising, on advice of counsel, the objection which the Circuit Court of Appeals held to be fatal to the validity of the verdict, is a question on which there are two sides, and which it is neither material nor appropriate to discuss at length here. It is a consideration, however, to which this court has more than once referred, and which has influenced many of the decisions, that one on trial upon a criminal charge is necessarily under a sort of duress which affects his will and judgment in connection with the proceedings of his trial. Even as a moral question, therefore, his agreement or waiver or consent ought not in all cases to be regarded in the same light as the contract of an absolutely free agent in a matter belonging to the ordinary affairs of life.

The petition several times says that the decision to continue the trial without a full jury was reached at the *request* of the defendant. There is no authority in the record for this statement except the assertion of counsel for the United States in the "answer to the motion in arrest of judgment" on page 52 of the record. Neither the present district attorney nor the present counsel for the respondent were connected with the case at the time of the trial, but counsel for the respondent are prepared to assert on reliable infor-

mation and belief that the respondent was with difficulty persuaded to consent to a proceeding which he believed at the time involved a danger to his interests.

But too much has already been said on points which are believed to be wholly immaterial.

The government's eighth proposition is stated rather strongly, so far as it relates to Judge Lowell. Some inference as to his first impression can perhaps be drawn from the fact that he permitted the trial to proceed under the stipulations filed by the parties. But it is hardly fair to treat this as equivalent to an opinion rendered after full argument and examination of authorities. The government is entitled under this head of its argument only to such advantage as may arise from the fact that one judge on the Circuit Court of Appeals dissented, and the respondent submits with all deference that the grounds on which the dissent is rested are completely answered by the majority opinion, and by the decisions of this court cited above.

D. THE QUESTION OF JURISDICTION.

The arguments thus far presented have been addressed to the discretion of the court, by which its action on any petition for *certiorari* is governed, when there is no question of the power of the court to issue the writ. In the present case, however, it is by no means clear that the court has that power.

The Supreme Court has no general power to issue writs of *certiorari* without express statutory authority, and such authority in this case must be found, if at all, in the Act of March 3, 1891, commonly called the Judiciary Act.

Ex parte Gordon, 66 U. S. 503.
American Construction Co. v. *Jacksonville, etc., Ry. Co.*, 148 U. S. 372, 380.

This was the act by which the Circuit Court of Appeals was created, and in the language of this court in the case last cited (p. 382) the entire appellate jurisdiction from the circuit and district courts of the United States was distributed between the Supreme Court and the circuit courts of appeals. Section 5 of the Act provides that appeals or writs of error may be taken from the district and circuit courts direct to the Supreme Court in certain enumerated cases. Section 6 provides as follows:—

> The circuit courts of appeals . . . shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, . . . and the judgments or decrees of the circuit courts of appeals shall be final in all cases . . . under the criminal laws . . . excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.
>
> . . . . . .
>
> And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination *with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.*

None of the cases cited by the government are sufficient to show the existence of the power now in question, and the reasons for the decision of this court in

United States v. *Sanges*, 144 U. S. 310,

would seem to be fully applicable to the present case. In that case the defendants had been indicted for conspiracy to deprive a citizen of a right secured to him by the Constitution of the United States, and on demurrer to the indictment a question of the construction or application of the Constitution was directly raised. Section 5 of the act above

referred to authorizes appeals or writs of error direct from the district or circuit courts to the Supreme Court "in any case that involves the construction or application of the Constitution of the United States." The demurrer having been sustained, the government attempted to take the case to this court by writ of error under the above provision of the statute. Although the case was thus within the express terms of the act, the court held upon historical grounds that, without a specific provision conferring upon the United States the right to bring up a criminal case after judgment below in favor of the defendant,

> it is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States. (p. 323.)

It was the evident purpose of the act creating the circuit courts of appeals, as stated in the passage already referred to in *American Construction Company* v. *Jacksonville, etc., Railway Company*, to relieve this court of the overburden of cases and distribute between the circuit courts of appeals and this court all the previously existing appellate jurisdiction from the district and circuit courts,—not to establish appellate jurisdiction in a class of cases in which it had not before existed. If Section 6 of the Judiciary Act, instead of making the judgment of the circuit courts of appeals in certain cases final, subject to the power of *certiorari*, had provided that in all cases over which those courts have appellate jurisdiction there should be of right an appeal or writ of error or review of the case by the Supreme Court, it must have been held, under the decision in the *Sanges* case above cited, that such a general provision did not authorize a writ of error or review in a criminal case decided against the government. Both the language of the provision for *certiorari* and the evident intention of the act as a whole indicate that the procedure by *certiorari* was merely substituted for the procedure by writ of error or appeal, and was

not intended to give a right of review by *certiorari* under circumstances in which such review would constitute, in the language of the *Sanges* case, a serious and far-reaching innovation in the criminal jurisprudence of the United States.

The case of

United States v. *Cadarr*, 197 U. S. 475,

on which the government relies, fails to establish the proposition contended for. In the first place it does not appear that either party in that case raised any question of jurisdiction, and this fact is somewhat significant. As pointed out in

United States v. *Sanges* (above cited), at p. 319,

the Supreme Court in 1803 took jurisdiction of a writ of error sued out by the United States in a criminal case, no objection being made (*United States* v. *Simms*, 5 U. S. 252), but, when the objection was later raised in a like case, the court held that it had no jurisdiction, and that the former case, in which the point was not raised, was for that reason not binding.

United States v. *More*, 7 U. S. 159, 172.

A similar incident, occurring in the October term 1885, is also referred to in the *Sanges* case (p. 320).

The assumption of jurisdiction in the *Cadarr* case, however, requires no such explanation. That case arose in the District of Columbia under a code which gives to the government the same right of appeal in a criminal case that is given to the defendant, except, however, that a verdict in favor of the defendant cannot be set aside.

Code of Law for the District of Columbia, Sec. 935.

Section 234 of the same code provides for *certiorari* from the Supreme Court in any case in which the judgment of the Court of Appeals is made final, which includes criminal cases.

In the *Cadarr* case a motion to quash the indictment had

been sustained by the Supreme Court of the District, and the government had appealed to the Court of Appeals, which had affirmed the judgment of the Supreme Court. Thereupon a writ of *certiorari* was issued by this court on petition of the government. It thus appears that (to use the language of the *Sanges* case) the "innovation in criminal jurisprudence," involved in allowing appeal by the government in a criminal case, had been made by express statute, and, there being no longer any distinction between the right of the government and that of the defendant in the matter of appeal in such a case, there was little ground for making such a distinction in the matter of *certiorari*.

In the absence of a similar statute applicable to the federal courts in the various circuits, the issue of a writ of *certiorari* in the case at bar would seem to be entirely inconsistent with the reasoning and the decision in

United States v. *Sanges* (above cited),

and finds no authority in any of the cases cited by the government.

If these considerations did no more than raise a doubt of the power of the court, the respondent submits that the occasion for the issue of the writ can hardly be regarded as sufficiently urgent to require the exercise of a doubtful jurisdiction.

Respectfully submitted,

FRANK W. HACKETT,
POWERS & HALL,
Attorneys for Respondent.

Supreme Court of the United States.

October Term, 1908. No. 805.

UNITED STATES,
Petitioner,
v.
JOHN W. DICKINSON,
Respondent.

Supreme Court, U. S.
FILED
JAN 7 1909
JAMES H. MCKENNEY
Clerk

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

APPENDIX TO RESPONDENT'S BRIEF.

POWERS & HALL,
Counsel for the Respondent.

BOSTON:
Geo. H. Ellis Co., Printers, 272 Congress Street.
1909.

APPENDIX.

In the dissenting opinion in the case at bar the following opinion is expressed as to the current English understanding and practice on the question of waiver of the full number of jurors (Record, p. 178):—

> I do not agree that the historical jury of England, in respect to the number of twelve, or in respect to waiver, as the right of jury has been administered in English proceedings, is quite as hard and fast as the majority opinion assumes, and I incline to the belief that the English jurist of to-day would be greatly surprised to learn that a jury trial in a misdemeanor case is constitutionally and historically invalid because a juror had been removed from the panel by reason of sickness or death, occurring in the course of the trial, and where the defendant freely and intelligently exercised his right of waiver, and where the Crown and the accused, under the discretionary approval of the court, waived all objections and formally consented in writing that the trial should proceed, and where such a course was adopted as something in the just administration of the law in respect to the rights of the defendant and the rights of the Government as well.

To answer this suggestion, in the only way which appeared to be available, and to test the soundness of the conclusions they had deduced from their search of authorities, counsel for the respondent wrote to a firm of English solicitors, asking them to obtain an opinion on the subject from an eminent barrister in criminal practice, to be selected by the solicitors.

The opinion received in response to this request is of course not presented as an authority in the ordi-

nary sense. Counsel for the defendant procured it, however, in the endeavor to obtain all possible light on the question at issue, and now present it for such value as it may possess as cumulative evidence of the common law practice in relation to the number of jurors. The endeavor was made to secure the best advice obtainable,—advice not influenced by any attempt to support either side of the controversy.

The papers forwarded for submission to the barrister were as follows:—

STATEMENT OF FACTS AND QUESTIONS SUBMITTED.

STATEMENT OF FACTS.

A defendant indicted for an offence against the United States Banking Laws in the nature of embezzlement, punishable by from five to ten years' imprisonment, was put upon trial before a properly constituted Court with a jury of twelve men. Near the close of a very long trial one of the jurors was taken ill and was unable to sit further in the case. It was thereupon agreed by the prosecuting attorney in behalf of the United States, and by the defendant himself and his counsel, that the trial might proceed with the remaining eleven jurors with the same force and effect as if a juror had not been discharged. A written agreement to that effect was filed and was approved by the presiding Judge and the trial proceeded accordingly. A few days later another juror was discharged for a similar reason, and a similar agreement was filed, under which the trial proceeded with the remaining ten jurors. These ten jurors found the defendant guilty.

PURPOSE OF OUR INQUIRY.

On the foregoing facts the question is now raised, whether any judgment can lawfully be pronounced upon such a verdict, and in particular whether the proceeding was in conflict with

a clause of the United States Constitution which provides that "the trial of all crimes . . . shall be by jury." It being a well-established rule of construction in the United States Courts that common law terms used in the Constitution are to be understood in the sense which they bore in the English common law at the time of the adoption of the Constitution, it becomes a material question whether trial by jury, as understood and practised in criminal cases in England in the latter part of the eighteenth century, permitted or recognized such a reduction in the number of the jury. That is primarily a question to be answered by reference to English authorities, and we have made and are making a search of those authorities on this point. We find plenty of general expressions, to the effect that a jury must consist of twelve men, that a verdict must be the unanimous verdict of twelve, and the like, but so far as our search has proceeded we find a rather surprising absence of any reference to exactly such a situation as arose in the case we have stated. In other words, we find no specific reference whatever to the proper or customary procedure when one member of a jury died or was taken seriously ill in the course of a criminal trial. That situation has arisen in the Courts of nearly all our states. In some states it has been held that the trial might proceed by consent of both sides with eleven jurors and a lawful verdict be rendered; in other states the opposite decision has been reached; and it has been both contended and denied by learned judges in this country that the form of procedure above described is in accordance with English common law practice.* It has also been contended that on this point there is a distinction in English practice between felony and misdemeanor.

Under these circumstances, we desire to supplement our study of the English authorities and the history of jury trial by an inquiry as to present day understanding and practice in England, which would have a very evident bearing on the probable practice and understanding in 1789, when the United

*To be exact, the suggestion in the dissenting opinion in the case at bar is the only instance of this contention which counsel for the respondent have found.

States Constitution was adopted. We therefore desire to submit the following questions:—

QUESTIONS SUBMITTED.

1. Is it now customary or regarded as permissible in English criminal trials to discharge one or more jurors during the trial and accept a verdict from the remainder under any circumstances or in any class of cases?

2. If so, under what circumstances and in what classes of cases?

3. If such a practice exists, is it generally understood to be a practice of ancient or of modern origin, and if the latter, how recent is it and on what basis is it generally understood that the departure from the ancient practice is justified?

4. If no such practice exists at the present day, has it, so far as you know, ever existed, or is it the general understanding of the bar that in criminal trials a verdict by less than twelve has never under any circumstances been valid?

5. If the practice above referred to does not exist, what is the customary procedure when it develops in the course of a protracted criminal trial that one juror, from death, illness, or other cause, is unable to take any further part in the trial? Is a new jury impanelled and the trial begun again, or is the prisoner discharged? Is it your understanding that the modern practice on this point is the same which has always been followed?

Judging from the frequency with which such a situation has arisen in this country, we have assumed that the English practice under the same circumstances must long since have become so fixed and the understanding of the bar on the point so clear and definite that the foregoing questions can be readily answered in general terms by a barrister of experience in criminal trials. We appreciate that, if the answer to our first question were affirmative, complete and definite answers to the second and third questions might involve extensive research into the history of jury trial, and the same would be true of the lines of inquiry opened by our fourth question and the last clause of our fifth. While appreciating

the value of an opinion on all these points from an able and experienced English barrister based on thorough research, we are not authorized to incur the expense which the preparation of such an opinion would involve. We desire merely such answers to our questions as the experience of the barrister to whom they are submitted enables him to give without special research or examination of authorities. If, however, it should happen that he is familiar with English authorities dealing with the precise situation involved in our case, to which he could refer us without having to look the point up, we should be very grateful for the assistance which such a reference would afford us in our study of the English books.

The opinion received in answer to the foregoing questions is that of Mr. C. F. Gill, K. C., and is as follows:

OPINION.

1-3. Under no circumstances and in no class of cases is it now permissible in English criminal trials to discharge one or more jurors during the trial and accept a verdict from the remainder.

4. No such practice has ever existed, and it is the general understanding of the Bar that in criminal trials a verdict by less than twelve has never under any circumstances been valid.

5. The proper course to adopt in the event of the death or serious illness of a juryman during the course of a criminal trial has been considered by the English Courts in several cases. The jury should be discharged, and the prisoner tried *de novo* or another juryman may be added to the eleven, but in that case the prisoner should be offered his challenges over again as to the eleven and the eleven should be sworn *de novo*. See *R.* v. *Scalbert* (1794), 2 Leach, p. 620, and the earlier cases cited in the notes to that case: *R.* v. *Edwardes* (1812), R. & R., p. 224, *R.* v. *Beere*, 2 M. & R. (1843), p. 472, *R.* v. *Ashe* (1845), 1 Cox, p. 150.

It will be observed that in some of these cases, on the second

trial the Judge read over his note of the evidence given at the abortive trial to the witnesses and asked them if it was correct, but there is grave reason to doubt whether this course can properly be adopted even with the consent of the prisoner, and where the witnesses are submitted at the pleasure of Counsel on either side to fresh oral examination and cross-examination. See the judgment of Sir John Coleridge in *R.* v. *Bertrand* (1867), L. R. 1 P. C. pp. 534–6, in the course of which he says, "The most careful note must often fail to convey the evidence fully in some of its most important elements,—those for which the open oral examination of the witness in presence of prisoner, judge and jury is so justly prized. It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner when that has been important, upon the statement of anything of particular moment; nor could the judge properly take on him to supply any of these defects; who indeed will not necessarily be the same on both trials: it is, in short, or it may be the dead body of the evidence without its spirit: which is supplied when given openly and orally, by the ear and eye of those who receive it."

He also points out that it is a mistake to consider the question only with reference to the prisoner and that in the interests of the due administration of justice it is essential that no unnecessary difficulty should be thrown in the way of the jury understanding and rightly appreciating the evidence.

(Signed) CHARLES F. GILL,
3 Temple Gardens,
Temple.
London, E. C.

1ST DECEMBER, 1908.

Supreme Court of the United States.

UNITED STATES,
PETITIONER,

v.

JOHN W. DICKINSON,
RESPONDENT.

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

BRIEF FOR THE RESPONDENT.

STATEMENT OF FACTS.

The respondent Dickinson and one Foster were jointly indicted under section 5209 of the Revised Statutes, which is a part of the National Bank Act. The material portion of this section is as follows;—

> Every president, director, *cashier*, teller, clerk, or agent of any association, who embezzles, abstracts, or *wilfully misapplies* any of the moneys, funds, or credits of the association; . . . with intent, in either case, to injure or defraud the association . . . ; *and every person who with like intent aids or abets* any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

Foster, the principal defendant, was cashier of the South Danvers National Bank, and was charged with wilfully misapplying the funds of the bank, and Dickinson was charged with aiding and abetting. Both having been convicted, Dickinson sued out a writ of error, and after argument before the Circuit Court of Appeals for the First Circuit his conviction was held invalid by that court by reason of the fact that the verdict against him was found by only ten jurors. On a writ of *certiorari* issued on petition of the United States the case has been brought to this Court.

On the other questions raised by the writ of error and argued before the Circuit Court of Appeals, the decision of that court was adverse to the respondent.

The questions to be argued in this brief are those relating to

I. The jurisdiction of this Court.
II. The sufficiency of the indictment.
III. The validity of the verdict found by ten jurors.

The Indictment.

The indictment (Record, p. 2) contained fifteen counts, of which it ultimately appeared that the thirteenth and fourteenth were intended to charge the same offence. There were therefore fourteen separate offences charged. The dates alleged ranged from June 10, 1899, to May 14, 1900. Each count stated by way of inducement that the South Danvers National Bank was a duly organized na-

tional banking association under the laws of the United States, located and doing business at Peabody, in the District of Massachusetts, and had an account and credit with the Suffolk National Bank of Boston, and from time to time made deposits to the credit of its said account with the Suffolk Bank, and at all times charged its said account for moneys, funds, and credits paid and applied by the Suffolk Bank for the use of the South Danvers Bank; that George M. Foster was cashier of the South Danvers Bank; and as such assisted the said bank in the transaction of its banking business. Each count then charged in substance that the said George M. Foster on a designated date, without the knowledge and without the consent of the said South Danvers National Bank, did wilfully misapply a designated amount of the moneys, funds, and credits of the said bank, by unlawfully, etc., converting said moneys, funds, and credits to the use, benefit, and advantage of John W. Dickinson, with intent to injure and defraud the said bank. Each count further alleged in substance that the said John W. Dickinson on the same date, well knowing the premises, did unlawfully, etc., with intent to injure and defraud the said bank, aid and abet the said Foster to commit the said offence and crime of wilfully misapplying the said moneys, funds, and credits.

The description of the property misapplied in the first count was as follows:—

certain money of said The South Danvers National Bank, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents, certain funds of said The South Danvers National Bank, to the amount

and of the value in all of three thousand five hundred and thirty seven dollars and ninety-two cents, said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents, certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents, a certain credit of said The South Danvers National Bank, to the amount and of the value of three thousand five hundred and thirty-seven dollars and ninety-two cents, a certain credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston to the amount and of the value of three thousand five hundred and thirty-seven dollars and ninety-two cents, a more particular description of said money, funds, credit, and credits being to said jurors unknown (Record, p. 2).

The second count alleged the misapplication of certain money of said The South Danvers National Bank, to the amount and of the value in all of five thousand dollars, certain funds of said The South Danvers National Bank, to the amount and of the value in all of five thousand dollars, certain credits of said The South Danvers National Bank, to the amount and of the value in all of five thousand dollars, a more particular description of said money, funds and credits and of the values thereof being to said jurors unknown (Record, p. 5).

This latter form of description, except for the amount alleged, was exactly followed in the sixth, tenth, and fourteenth counts. The remaining counts, among which are the three on which the defendants were convicted, followed the same form as the first count.

Except for this difference, and the dates and amounts, all the counts were exactly alike.

The defendant Dickinson demurred to the indictment and to each and every count thereof, assigning numerous grounds of demurrer (Record, pp. 28 and 32). Those relied on before this Court are summarized below in connection with the argument on the sufficiency of the indictment. The demurrer was overruled (Record, p. 33), and a bill of exceptions to this ruling was duly allowed (Record, p. 39). The assignments of error based on the overruling of the demurrer are the first, second, and third (Record, pp. 150–152).

The Reduction of the Number of Jurors.

It appeared in the course of the trial that one of the jurors by reason of illness was unable to sit further, whereupon the following agreement was filed of record (Record, p. 37):—

> Whereas one of the jurors impanelled to try the above-entitled indictment is unable by reason of illness to further sit therein,
>
> Now, therefore, we consent and agree that the said juror, to wit, Charles F. Low, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining eleven jurors with the same force and effect as if said juror had not been discharged.
>
> JOHN W. DICKINSON,
> GEORGE M. FOSTER,
> UNITED STATES,
>
> *by* BOYD B. JONES,
> *Special Assistant U. S. Attorney.*

The court then proceeded with the trial with the remaining eleven jurors. On a subsequent day, the

trial being still unfinished, it appeared that a death had occurred in the family of one of the remaining jurors, and another agreement was filed of record, as follows (Record, p. 37):—

Whereas one of the jurors impanelled to try the above-entitled indictment is unable by reason of a death in his family to further sit therein,

Now, therefore, we consent and agree that the said juror, to wit, Edward E. Stockman, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining ten jurors with the same force and effect as if said juror had not been discharged.

JOHN W. DICKINSON,
GEORGE M. FOSTER,
BOYD B. JONES,
Special Assistant U. S. Attorney.

The trial then proceeded with the remaining ten jurors, who returned a verdict on March 20, 1903 (Record, p. 38). Both defendants were found guilty on the first, third, and fifteenth counts.

On March 23, 1905, judgment not having been pronounced, the defendant Dickinson filed the following motion in arrest of judgment (Record, p. 39):—

And now, after verdict against the said John W. Dickinson, and before sentence, comes the said John W. Dickinson, by his attorneys, and moves the court here to arrest judgment herein and not pronounce the same, because of manifest errors in the record appearing, to wit: Because the said verdict against the said John W. Dickinson was found by a so-called jury consisting of ten (10) jurors only, and not by a jury of twelve (12) jurors, as required by the Constitution and laws of the United States, and because no judgment against him, the said John W. Dickinson, can be lawfully rendered on said verdict.

POWERS & HALL,
Attorneys for the said Defendant.

This motion was overruled on August 10, 1906, and a bill of exceptions to this ruling was duly allowed on the same day (Record, p. 41).

Thereupon the defendant was sentenced by the court to nine years' imprisonment in the jail at Dedham (Record, p. 149).

The question of the validity of the verdict and of the judgment and sentence pronounced thereon is raised by the 53d and 54th assignments of error (Record, p. 159).

Assignments of Error not Relied on.

For the purposes of the argument before this Court the respondent waives all the assignments of error except the 1st, 2d, and 3d, relating to the indictment, and the 53d and 54th, relating to the validity of the verdict and the judgment thereon.

ARGUMENT.

I.

THE QUESTION OF JURISDICTION.

While there is no doubt of the power of this Court, under section 716 of the Revised Statutes, and independently of the Act of March 3, 1891, to issue writs of *certiorari* in proper cases, when the circumstances imperatively demand that form of interposition, to correct excesses of jurisdiction, and in the furtherance of justice (*Ex parte Chetwood*, 165 U. S. 443), it will hardly be argued that the present case is a proper one for the exercise of that extraor-

dinary power. In other words, it will be conceded that the question of jurisdiction must be decided by construction of the provisions of the Act of 1891.

Cf. *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 380.

The present argument will, therefore, be confined to a discussion of the intent and effect of that statute.

The Act of March 3, 1891 (26 Stat. 826; 1 U. S. Comp. Stat. 1901, p. 546), framed for the purpose of relieving the Supreme Court from the excessive burden imposed upon it by its increasingly crowded docket, established the Circuit Courts of Appeals, and assigned to those courts a considerable part of the appellate jurisdiction formerly exercised by the Supreme Court.

The general purpose of the statute has been described by this Court as follows:—

> The primary object of this act, well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was to relieve this court of the overburden of cases and controversies, arising from the rapid growth of the country, and the steady increase of litigation; and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the Circuit Courts of Appeals thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the act, the entire appellate jurisdiction from the Circuit and District Courts of the United States.

American Construction Co. v. *Jacksonville, T. & K. W. R. Co.* (above cited), at p. 382.

Section 6 of the Act, omitting certain portions not here material, is as follows:—

> The circuit courts of appeals . . . shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, . . . and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.
>
> . . . . . .
>
> And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

At the time when this Act was passed the only existing method by which a decision of the Supreme Court could be obtained on a question of law arising in a criminal case not capital was upon certificate of difference of opinion by the judges of the Circuit Court, under sections 651 and 697 of the Revised Statutes. In capital cases, by the Act of Feb. 6, 1889, c. 113, s. 6 (25 Stat. 656), the defendant was given the right to obtain a review in

this Court by writ of error. The Act of 1891 preserved this right (section 5), but superseded the existing statutory provisions as to a certificate of difference of opinion. It contains at least four provisions under which a decision in a criminal case not capital can be reviewed in an appellate court: *first*, the provision of section 6 granting appellate jurisdiction to the Circuit Court of Appeals in all cases not provided for in section 5; *second*, the provision of section 5 by which any case involving the construction or application of the Constitution of the United States can be taken directly from the Circuit or District Court to the Supreme Court by appeal or writ of error (that these two provisions are not mutually exclusive and that a criminal case not capital involving a constitutional question may be taken either to the Court of Appeals, or directly to this Court, is clear from *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277, and *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397); *third*, the provision of section 6 permitting the Circuit Court of Appeals, in any case in which its decision is by that section made final, to certify to the Supreme Court particular questions or propositions of law concerning which it desires the instruction of that Court; *fourth*, the provision of section 6 by which any such case may be brought before this Court by writ of *certiorari* for review and determination upon all questions properly raised on the record.

The clause of section 5 which would undoubtedly be held to authorize direct appeals to this Court in criminal cases involving a constitutional question, makes no distinction in its language be-

tween civil and criminal cases, and no distinction as to the party who is aggrieved by the decision in the court below. Any limitation in the latter respect in criminal cases must be read into the statute wholly by implication. It was nevertheless held in

United States v. *Sanges*, 144 U. S. 310,

that the right of review given by that provision of section 5, so far as it relates to criminal cases, must be limited to review at the instance of the defendant after a decision in favor of the Government. This conclusion did not result from any question of the constitutional power of Congress to authorize an appeal by the Government, it being conceded that no constitutional provision would be violated by allowing the Government to obtain a review under the circumstances involved in that case. Neither was the decision based upon any words in the statute itself which could be held either to express or to imply any exception or limitation. It proceeded solely on the ground that, for reasons stated at length in the opinion, and notwithstanding the general language employed, it could not be fairly inferred that Congress intended to authorize a review in a criminal case of a decision in favor of the accused.

It cannot be doubted that under the authority of the *Sanges* case, and on the same grounds, the general provision of section 6 granting appellate jurisdiction to the Circuit Court of Appeals would be held subject to the same limitation.

The same question does not arise in connection

with the provision for a certificate by the Circuit Court of Appeals of questions on which the judges of that court desire instruction, since, for the reason just stated, a criminal case would not be before them unless the decision below had been in favor of the Government, and their own decision would not have been rendered when the right to certify was exercised.

The same question can arise, however, under the provision for review in this Court by *certiorari*, and is the question raised by the present case.

It appears, therefore, that of the four provisions of the Act of 1891 under which criminal cases, being included with civil cases in the general language of the several provisions, can be made the subject of review in an appellate court, there are three under which the question may arise whether such review can be had after a decision in favor of the defendant, or, to put it in another way, whether a decision in favor of the defendant can be reversed in an appellate court.

As to one of these three provisions, that question has been authoritatively answered in the negative. Under another it will undoubtedly be conceded that the answer would be the same. The question arises in the present case, under the third provision, and the respondent contends that it must necessarily receive the same answer. The merit of this contention evidently depends upon whether the grounds of the decision in the *Sanges* case are applicable to the same extent and with the same force to the case here presented.

It should be clearly understood that the respondent does not rely upon any constitutional objection

to the power of Congress to authorize the review by this court,—whether by writ of error, appeal, *certiorari*, or otherwise,—of a decision in favor of the accused in a criminal case on a question of law, where there has been no verdict of acquittal by a jury. The question is exactly the same as in the *Sanges* case, namely, whether from the general language used in the statute it can be presumed that Congress intended to confer such jurisdiction.

The *Sanges* case proceeded purely and simply on the ground which is thus summed up in the concluding paragraph of the opinion:—

> In none of the provisions of this act, defining the appellate jurisdiction, either of this court, or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States (p. 323).

This decision is reached after an elaborate examination both of the Federal legislation as to appellate jurisdiction in criminal cases, and of the authorities in England and in the United States relating to criminal appeals, in which the Court finds no precedent, without express statutory enactment, for any review of any judgment in favor of the accused. The considerations which thus furnish the sole ground for that decision are in every respect as fully applicable to the case at bar.

In the first place, there is nothing in the language in which the power to review by *certiorari* is con-

ferred, which distinguishes the two cases. Both statutory provisions are absolutely general in their language; both would unquestionably authorize the review of a decision in favor of the accused, if there were no grounds outside the words of the statute for a different construction. There is no more intimation in one than in the other of an intention to make the "serious and far-reaching innovation in the criminal jurisprudence of the United States" which review of such a decision would involve.

Neither is it material to the present question that the power of the Supreme Court to issue *certiorari* is not made conditional upon an application by either party, and that in issuing the writ the Court may technically be regarded as acting of its own motion. There is no more precedent in the common law, or the Federal statutes, for authority in an appellate court, acting of its own motion, to review a decision in favor of the defendant in a criminal case than there is for review of such a decision upon writ of error or in any other form of appellate procedure. The vital feature of the innovation which would have resulted from allowing the writ of error in the *Sanges* case consists in the fact that it would have permitted a decision in behalf of the defendant to be reopened and reversed by a higher court, not merely in the manner in which that result would have been reached.

It must be remembered that the question in the present case is simply whether Congress can be presumed to have intended a certain result. It is therefore the practical effect of the construction contended for that must be considered, and the

practical effect of the Government's contention would be, in every case in which the writ was issued, exactly the same as if the Government were allowed a writ of error.

Neither is it material that a writ of *certiorari* under the Act of 1891 is not issued as of course, but only in the discretion of the Court. The characteristic feature of the "innovation" referred to in the *Sanges* case would not consist in its allowing the Government to *demand* a review, but in its allowing the Government to *obtain* one. There is no reason to believe that the decision in the *Sanges* case would have been different if the statute had made the allowance of a writ of error in all cases within the terms of section 5 dependent upon the discretion of this Court.

Neither is it material that the decision of the Circuit Court of Appeals in the present case does not call for the immediate discharge of the defendant. It will hardly be contended that, if the Circuit Court had sustained the motion in arrest of judgment, it would have been consistent with the *Sanges* case to allow the Government a writ of error.

Neither is it material that under the provisions of the Act of 1891 this Court may issue its writ of *certiorari* before as well as after the decision in the Circuit Court of Appeals, and that the present case could, therefore, have been brought here by *certiorari* on the petition of the Government at any time before decision in the Court of Appeals was rendered. This may be conceded without touching the present question, since there is no innova-

tion in permitting the decision of a question of law raised by the defendant in a criminal case, but not yet decided in his favor, to be transferred to this Court at the request of the Government and without the consent of the defendant. Exactly that was done for nearly a century before the Act of 1891 was passed, in cases of certificate of difference of opinion between the judges of the Circuit Court,—a fact which supports and illustrates the point made above, that the "innovation in criminal procedure" referred to in the *Sanges* case must mean any procedure under which a decision once rendered in favor of the defendant could be reviewed and possibly reversed, it being no innovation and therefore no part of the ground of the decision that the jurisdiction of the appellate court was there formally invoked by the Government as of right.

Neither is it material that, as the Government urges with great emphasis in its brief, if this Court is without jurisdiction of the case at bar, "questions of gravity and importance to the whole people" may be decided by "a tribunal of inferior rank, the decisions of which as to these questions are or may be at variance with those of other courts in the country of the same rank, or even of this Court itself," and "the Government must abide by the result though erroneous." Exactly that possibility existed before the Act of 1891 was passed, there being no way whatever by which, in any criminal case, a decision once rendered by the Circuit or District Court could be taken to this Court for review at the instance of the Government. A similar situation exists to-day in nearly every State in the Union.

It is important to remember in this connection that the intent of Congress as expressed in the Act of 1891 must be judged without any reference to the recent remarkable development, in political and economic importance, of certain branches of the Federal criminal law. The temper of the public mind has lately been distinctly favorable to innovations in criminal jurisprudence in the direction of strengthening the arm of the Government, particularly in certain classes of prosecutions. Such conditions have found natural expression in such recent legislation as the Act of Congress which was before this Court in

Taylor v. *United States*, 207 U. S. 120.
United States v. *Bitty*, 208 U. S. 393.

These present conditions, however, are of no assistance in determining the intent of Congress in 1891. The arguments they furnish are properly addressed to the Congress of the present day, and not to this Court.

Finally any consideration of the question here raised must give full weight to the rule expressed as follows in

Cross v. *United States*, 145 U. S. 571, 574.

> We have, of course, no general authority to review, on error or appeal, the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction, or those of the Supreme Court of the District of Columbia or of the Territories; and when such jurisdiction is intended to be conferred, it should be done in clear and explicit language.

Had section 6 of the Act provided that all cases within that section might be taken from the Circuit Court of Appeals to this Court by writ of error or appeal, it would be clear under the decision in the

Sanges case that the provision could not be construed as permitting in a criminal case the review of a decision of the Circuit Court of Appeals in favor of the defendant.

In other words, such a provision would not be sufficient to show an intent on the part of Congress to make "a serious and far-reaching innovation in criminal jurisprudence." How, then, can such an intent be implied from the substitution in certain classes of cases, for the obvious purpose of diminishing the burdens of this Court, of a discretionary appellate jurisdiction in place of the obligatory jurisdiction which is given "in all other cases."

II.

THE DEMURRER TO THE INDICTMENT.

The first three assignments of error (Record, pp. 150–152) are based on the overruling of the respondent's demurrer to the indictment. The first and second assignments rely specifically on certain grounds of demurrer therein recited. The third assignment incorporates by reference all the grounds alleged in the original demurrer (which appears on pages 28 to 31 of the Record) and in the additional grounds of demurrer subsequently filed (Record, p. 32).

The objections made to the indictment, though repeated in various forms, are in substance as follows:—

(1) That it does not contain the necessary averments of fact to show how the alleged misapplica-

tions were made or that they were unlawful within the meaning of section 5209, and therefore does not fully and clearly charge the commission of any criminal offence. (See the 7th, 8th, 9th, 10th, 11th, and 12th grounds of demurrer; the first assignment of error, paragraphs *d*, *e*, *f*, and *g;* and the third assignment of error.)

(2) That the offence intended to be charged is not set forth with sufficient certainty to inform the accused of the nature and cause of the accusation. (See the first five grounds of demurrer and the two additional grounds of demurrer numbered 13th and 14th; the first assignment of error, paragraphs *a*, *b*, and *c;* the second and third assignments of error.)

The legal principles applicable to this branch of the case are familiar ones, over which there will be little controversy, the difficulty, if any, being in their application to the language of the indictment.

A. TWOFOLD PURPOSE OF AN INDICTMENT.

The fundamental principles relied on are that the indictment must allege specifically, and in the form of statements of fact, all the elements necessary to constitute the offence, and that the allegations must be sufficiently certain and definite to give the accused reasonable information of the charge against him. These principles are common to all pleading, but, in keeping with the general attitude of the law toward criminal prosecutions, are enforced with especial strictness in criminal cases.

The object of the indictment is twofold. As stated in

United States v. *Cruikshank*, 92 U. S. 542, 558, it is

> first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.

This twofold purpose is worthy of a moment's consideration.

A criminal indictment not only corresponds to a declaration in a civil suit, but it also has some of the elements of a special verdict. Under the Federal Constitution no man can be put upon trial for an infamous crime until twelve members of a grand jury have on their oaths found and reported that he has done that which the law makes criminal. But the grand jury, like the petit jury, are judges of fact, and not of law. It is not their function to construe the criminal statutes or to determine whether certain acts constitute a crime. "Facts are to be stated, not conclusions of law alone." They must find and report the acts in fact done, the intent, and, so far as material, the circumstances in fact existing. It is then for the court to determine the legal effect of these findings. If the facts found leave it in doubt whether or not a crime has been committed, the indictment is bad. It is no more the function of the court to draw inferences of

further facts than it is the function of the grand jury to draw conclusions of law. The indictment, therefore, like a special verdict, must contain express findings of all the facts necessary to constitute the offence, and to show not merely as a probable inference of fact, but as a necessary conclusion of law, that a crime has been committed.

The nature and scope of this requirement are clearly brought out in the following extracts from the opinions of this Court.

> With rare exceptions, offences consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offence is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error.
>
> *United States* v. *Cook*, 17 Wall., 168, 174.

> The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offence must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication.
>
> *Pettibone* v. *United States*, 148 U. S. 197, 202.

> The statute upon which the indictment is founded only describes the general nature of the offence prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offence, states no matters upon which issues could be framed for submission to a jury.
>
> *United States* v. *Hess*, 124 U. S. 483, 486.

> The indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—

that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offence alleged.

United States v. *Cruikshank*, 92 U. S. 542, 559.

This function of the indictment as securing the citizen against prosecution for crime without a preliminary finding by twelve of his fellow-citizens that he has committed acts which the court can determine to be a crime, is distinct from its other equally important function as giving the accused reasonable notice of the charge which he must be prepared to meet. The former benefit was that intended to be secured by the provision of the Fifth Amendment, that no man shall be held to answer for an infamous crime unless on a presentment or indictment of a grand jury, and the latter by the provision of the Sixth Amendment, that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation.

Postponing for the moment further consideration of the rule as to the certainty with which the accused must be informed of the charge against him, we will examine more particularly the rule requiring findings of fact by the grand jury sufficient to show as a necessary conclusion of law the commission of a crime.

B. THE RULE REQUIRING DEFINITE ALLEGATIONS OF ALL FACTS NECESSARY TO CONSTITUTE A CRIME.

1. Application of the Rule to Statutory Offences.

It is evident that, to satisfy this rule, the findings of the indictment must be expressed in language accurate, definite, and unambiguous. In the case of common law crimes there are usually certain technical forms of expression uniformly used and always understood in an exact technical sense, which in combination make up a full, explicit, and definite description of the necessary acts and intent. Where a statute creating a new offence is expressed in similar language, including a full enumeration of the physical acts, the intent, and the circumstances necessary to constitute the offence, an indictment in the language of the statute will ordinarily be sufficient. But where, as is often the case, the language of the statute does not of itself absolutely define the limits of the offence, but requires to be construed in the light of the subject-matter, the evident purpose of the enactment, and other similar considerations, an indictment in the language of the statute would not satisfy the rule. The statute may leave some elements of the offence or some qualifications of the general language used to inference or construction. The indictment must be specific and definite in all such particulars. Any other rule would lead to hopeless confusion, since it is evident that considerations which might enable the court to determine without hesitation what the legislative body meant by certain ambiguous language

used in a statute, might have no bearing whatever on the probable meaning of the same language as used by a grand jury in an indictment. The rule has been stated by this Court as follows:—

> A rule of criminal pleading, which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in *United States* v. *Mills*, 7 Pet. 138, that an indictment for a statutory misdemeanor is sufficient, if the offence be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *United States* v. *Carll*, 105 U. S. 611, 612, "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. *United States* v. *Cook*, 17 Wall. 168, 174; *United States* v. *Cruikshank*, 92 U. S. 542, 558. "The fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." *United States* v. *Carll*, 105 U. S. 611.
>
> *Evans* v. *United States*, 153 U. S. 584, 587.

See to the same effect:—

Blitz v. *United States*, 153 U. S. 308.
Keck v. *United States*, 172 U. S. 434.
United States v. *Cruikshank*, 92 U.S. 542, 558.
United States v. *Hess*, 124 U. S. 483, 487.
Pettibone v. *United States*, 148 U. S. 197.
United States v. *Mann*, 95 U. S. 580.
United States v. *Carll*, 105 U. S. 611.

The difficulty may arise from the fact that the statute makes a conclusion of law part of the definition of the offence, as in the *Keck* case; or from the omission to express a limitation which the court by construction holds to have been implied, but within which the indictment must by express averment bring the act charged, as in the *Blitz* case; or from the fact that the statute, as said in the *Hess* case, "only describes the general nature of the offence," as by adopting as a test of criminality some quality or tendency of an act or device which involves an exercise of opinion. In such a case it necessarily follows that the indictment must so specifically describe the act or device that the court can determine whether the opinion is justified. Otherwise, the facts which the grand jury found, but did not specifically allege, may have been such as the court could say at once on a full statement of them would not justify the prosecution. In the language above quoted from the Cruikshank case,

> it must be made to appear—that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offence alleged (p. 559).

2. Analysis of Section 5209.

The particular statute here in question may now be examined in order to determine, as preliminary to the application of the foregoing principles, what offence or offences are intended to be forbidden. Omitting certain portions not here material, the statute is as follows:—

> Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misap-

plies any of the moneys, funds, or credits of the association; . . . with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

The words "embezzle," "abstract," and "wilfully misapply" have all been construed by this Court. It is settled that they are not to be regarded as synonymous, but are distinct in their meaning and application.

United States v. *Northway*, 120 U. S. 327.

The word "embezzle" has an exact technical meaning as a description of a criminal act. It has been familiar to the law from early times, and has always meant the fraudulent appropriation of personal goods of another by one who already has lawful possession or at least physical custody.

4 Bl. Com., pp. 230-231, and note.
1 Wharton's Criminal Law, 9th ed., § 1009, *et seq.*

The following definition is found in

Moore v. *United States*, 160 U. S. 268, 269-270.

Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

Accordingly, it was held in the *Northway* case that an indictment was sufficient which alleged in substance that the accused was president and agent of a national bank, and as such received into his possession certain of the moneys and funds of the bank, and, while they were in his possession as such president, wrongfully, unlawfully, and with intent to injure and defraud the bank did *embezzle* and convert to his own use the said moneys and funds.

It is evident from the above definition, and is recognized in all the cases, that the word "embezzle" can be applied only to tangible property of which the accused could have physical possession,—in general, personal property of a kind which could be the subject of larceny, or on the conversion of which an action of trover could be founded. All the other Federal statutes in which the word appears relate to property of that kind, and unquestionably use the term in its technical sense, involving possession by the offender. As used in section 5209, it is evidently so construed in the *Northway* case (p. 331).

The word "abstract," while not a word of art having a technical meaning in the law, is held in the *Northway* case to be a word of simple, popular meaning, without ambiguity, signifying "to take and withdraw from the possession and control of the bank the moneys and funds alleged to be so abstracted." In other words, in its ordinary and popular use it exactly and definitely describes the same act as the words "take and carry away" in an indictment for larceny; and the offence of abstracting money or securities under section 5209 is construed as differing from larceny only

because under the statute some other intent, such as the intent to deceive some officer of the association, may take the place of the *animus furandi*, which is an essential element of larceny. It was therefore held that a count of the indictment was sufficient which charged in substance that the defendant was president and agent of a national bank, and that he wilfully and unlawfully and with intent to injure the bank, and without its knowledge and consent, did *abstract* and convert to his own use certain moneys and funds of the association of an amount and value stated.

It is evident that the word "abstract," as thus construed, like the word "embezzle," can be applied only to tangible property of which the accused could take physical possession.

The words "wilfully misapply," being broader than either "embezzle" or "abstract," include within the prohibition of the statute offences to which neither of the other words can be applied. The statute relates to the misappropriation of "moneys, funds and credits." Moneys can of course be embezzled or abstracted, and it would seem a probable construction, which is supported by the use of the word in the cases, that "funds" is intended to describe securities which can be in the actual possession of the accused and stolen or embezzled. "Credits," however, unquestionably includes such intangible property rights as a deposit by the bank with another bank, or money due it from a depositor by reason of an overdraft, or any other bills or accounts payable, or indebtedness to the bank. It is evident, therefore, that the

word "misapply" was intended to include, not only such cases as those referred to in the *Northway* case on page 332, where an officer of the bank by reason of his control of its affairs directs the disposition of its money or funds without himself having or taking actual possession of them, but also all cases where the misappropriation is accomplished without transferring or dealing with money or funds of which physical possession can be had, as, for example, by drawing and negotiating a check against the account of the bank with another bank, by cancelling an indebtedness to the bank, or by some form of book-keeping entries, which makes some credit belonging to the bank available to some one else not lawfully entitled to it.

3. The Rule Expressly Laid Down for Indictments Charging Wilful Misapplication.

The word "misapply" is a broad and inclusive term, which has no settled technical meaning like the word "embezzle," and which is not in its popular sense a definite and unambiguous description of a physical act, like the word "abstract." It has therefore been held by this Court that it is not sufficient in an indictment under section 5209 to describe the act charged merely by the use of the word "misapply," a distinction being thus sharply drawn between that word and the words "embezzle" and "abstract." The leading case on the use of the word "misapply" is

United States v. *Britton*, 107 U. S. 655.

In that case the Court said (p. 669):—

> The words "wilfully misapplied" are, so far as we know, new in statutes creating offences, and they are not used in describing any offence at common law. They have no settled technical meaning like the word "embezzle," as used in the statutes, or the words "steal, take and carry away," as used at common law. They do not, therefore, of themselves fully and clearly set forth every element of the offence charged. It would not be sufficient simply to aver that the defendant "wilfully misapplied" the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made, and that it was an unlawful one.

Again in

Batchelor v. *United States*, 156 U. S. 426, 429,

it was said that the words "wilfuly misapply" must be supplemented by further averments "showing how the misapplication was made, and that it was an unlawful one."

These decisions are merely illustrations of the general principle above discussed, that the indictment must contain definite findings of fact, including the act, the intent, and, so far as material, the existing circumstances surrounding the act, such as to leave to the Court the determination of the question of law whether the facts found show, as a necessary legal conclusion, the commission of a crime.

The trouble with the word "misapply" is twofold. In the first place, apart from any limitations that may be imposed by construction of this particular statute, the description of any transaction with the moneys, funds, or credits of a bank as a

misapplication involves a conclusion of law, exactly as if the indictment used the equivalent expression, "wrongfully applied." In the second place, this Court has construed the statute as not intended to make criminal all transactions with the assets of the bank which might justly and properly be termed misapplications, and this construction is based, not upon any express limitation in the statute, but upon the inferences of the Court as to the probable intent and purpose of the legislation.

> *United States* v. *Britton*, 107 U. S. 655 (above cited).

For these reasons this Court has laid down the rule, as above stated, that the allegation of wilful misapplication "*must be supplemented by averments showing how the misapplication was made, and that it was an unlawful one.*" This must be taken as an authoritative statement of a test to which any indictment for "wilfully misapplying" must conform, and its plain meaning is that the indictment must show that a crime has been committed, not by an expression of the opinion of the grand jury as to the quality or effect of acts not specified, but by finding and alleging the specific acts done, so that the court can determine whether or not they constituted a violation of the statute.

4. Application to the Present Indictment.

The indictment in the present case must now be examined. Omitting the allegations as to the establishment of the bank, the position of the defendant

Foster as cashier, and other matters of inducement, the allegation of the intent, and the description of the property misapplied, each count of the indictment charges that Foster did on a certain date, "without the knowledge and without the consent of said The South Danvers National Bank, *wilfully misapply*" certain moneys, funds, and credits of the bank, "by then and there unlawfully, fraudulently, knowingly, wilfully, and designedly, without the knowledge and without the consent of the said The South Danvers National Bank, *converting said money, funds, credit, and credits and each thereof to the use, benefit, and advantage of John W. Dickinson* of Newton in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same, and of the use and benefit thereof," and that Dickinson aided and abetted in such misapplication. The sufficiency of the indictment as to Dickinson depends upon the sufficiency of the allegations as to Foster, and the only words which can be relied upon in the indictment as supplementing the allegation that Foster "wilfully misapplied" are the words "by converting . . . to the use, benefit and advantage of one John W. Dickinson, . . . thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof." It is the contention of the Government that these words are sufficient to make the indictment good, and this contention was rested, at the argument before the Circuit Court of Appeals, upon certain language of this Court in

Coffin v. *United States*, 156 U. S. 432, 449,

which is there quoted from the opinion in

United States v. *Britton*, 107 U. S. 655, 666 (above cited),

and also upon the decision of the Circuit Court of the United States for the First Circuit in

Jewett v. *United States*, 100 Fed. Rep. 832.

The language of the Court in the *Britton* and *Coffin* cases, on which the Government relied, is as follows:—

> Therefore, to constitute the offence of wilful misapplication there must be a conversion to his own use or to the use of some one else of the moneys and funds of the association by the party charged.

The actual decision in the *Coffin* case affords no assistance to the Government's contention, the indictment being sustained not because it alleged in terms that the accused converted the property of the bank to the use of some other person or corporation (there being no such allegation), but because it described in detail the acts done, the averments showing that the money of the bank was paid out to a designated person who was not entitled to receive it, and that by reason of the insolvency of the recipient the money was lost to the bank. To determine the meaning of the language quoted, reference must be made to the *Britton* case, in which that language was first used and in which there is a full discussion.

In the first place, it is evident from an examination of that opinion that the Court did not attach

special importance to the word "convert." In construing the statute and determining what classes of wilful misapplications were intended to be made criminal, the Court states practically the same proposition in four different ways, only once using the word "conversion."

On page 666 the Court says:—

> We think the wilful misapplication made an offence by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association. Therefore, to constitute the offence of wilful misapplication, there must be a conversion to his own use or the use of some one else of the moneys and funds of the association by the party charged.

After giving various illustrations of misapplications which would not be criminal, the proposition is again stated by way of conclusion, as follows (p. 668):—

> We are, therefore, of opinion that the wilful misapplication of the moneys and funds of the banking association, which is made an offence by sect. 5209, means something different from the acts of official maladministration referred to in sect. 5239, and it must be a wilful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association or some other body corporate or some natural person.
>
> As the counts under consideration, namely, count 77, and the similar counts down to and including count 96, do not show that the wilful misapplication therein alleged was made by the defendant for his own use, benefit, or advantage, but for the use of the association, we are of opinion that they do not allege an offence under sect. 5209 and are, therefore, insufficient and bad.

It is clear that the Court made no distinction between the phrase "conversion to his own use or the use of some one else" and the phrase "wilful misapplication for the use or benefit of the party charged or of some person or company other than the association." If, therefore, that case could be construed as meaning that an indictment is sufficient which charges misapplication "by converting to the use of" a designated person, it would be equally authority for the proposition that language would be sufficient charging merely that the defendant "wilfully misapplied to the use and benefit of" some person named.

It is evident from an examination of the opinion, however, that it is not authority for either proposition. To give it that effect would involve the erroneous assumption that there must necessarily be a single form of expression which will sufficiently describe in an indictment any form of misapplication intended to be forbidden by the statute. The Court was not attempting in the *Britton* case to construct any such universal formula for use in indictments. In seeking to determine whether certain acts specifically described in the indictment in that case were within the statute, it merely formulated one test of the criminality of an alleged misapplication. But it does not follow that the language used in stating this test, any more than the language of the statute itself, constitutes a full, accurate, and specific description of a particular criminal act. If it does not, an indictment in the language of the opinion is no better than an indictment in the language of the statute.

The question whether the present indictment is saved by the insertion of the words "to the use, benefit and advantage of John W. Dickinson" (postponing for the moment the question of any special virtue in the word "converting") is therefore not answered by what was said in construing the statute in the *Britton* case.

Considered more broadly, in the light of the established principles above discussed, that question must undoubtedly be answered in the negative.

In the first place, the addition of the words "to the use of Dickinson" does not necessarily limit the transactions to which the language of the indictment might be applied to those which are intended to be made criminal by the statute. The *Britton* case itself furnishes examples to illustrate this point. It is there pointed out that a loan to a single borrower in excess of ten per cent. of the capital stock of the bank, while it might be called a misapplication, would not be (provided of course there were no other wrongful element) a crime within this statute. But such a loan might nevertheless be described as a misapplication of the money lent to the use, benefit, and advantage of the borrower. Similar comment might be made on the other examples given,—a loan on security of the bank's own stock, or the purchase of land for purposes not authorized by law. Of course it is clear that, when the Court said that the misapplication must be "for the use or benefit of the party charged or of some person or company other than the association," it meant to imply a want of adequate consideration, or an intentional enrichment of the recipient at the

expense of the bank; and, so understood, the words used would not apply to the examples given of non-criminal misapplications. But, taken by themselves, the words "misapply to the use or benefit of another" do not clearly, necessarily, and without ambiguity denote what the connection makes it clear that they were intended to mean in the opinion. In an indictment, therefore, they do not, any more than "misapply" alone, necessarily show a criminal misapplication.

But if this were not so, the words "to the use, benefit and advantage of Dickinson" would not save the indictment. To satisfy the established rules, there must be averments showing "how the misapplication was made." To say that it was made for the use, benefit, and advantage of another does not meet this requirement. The words "to the use, benefit and advantage of Dickinson" do not necessarily mean more than that in the course of a transaction not described some money or property of the bank was paid or transferred to Dickinson. But if, in disregard of the rule that no essential element of the crime can be supplied by implication or intendment, they could be held to import further an improper enrichment of Dickinson at the expense of the bank, they would be, not a description of the act done from which the Court could determine its legality, but an expression of the opinion of the grand jury as to its tendency and effect. The indictment must state facts, and not opinions; it must allege the acts done, and not merely the tendency and effect as they appear to the jury. The indictment must show "how the misapplication was

made," and enable the Court to determine whether it had or could have the tendency and effect attributed to it, and whether under all the circumstances alleged it constituted a violation of the statute.

What has been said of the words "to the use, benefit and advantage of John W. Dickinson" is equally applicable to the words, which also appear in the indictment, "thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof." These words do not necessarily mean more than that in some way not described, which may have been lawful or unlawful, money or property of the bank passed out of its control. And however construed, they do not show "how the misapplication was made."

The Government's contention in support of the present indictment must therefore rest upon the use of the word "converting," either in itself or in connection with the words already discussed. It was the use of this word on which the Government chiefly relied at the argument before the Circuit Court of Appeals. The remaining question is therefore whether the word "converting" saves the indictment by furnishing a clear, exact, and specific description of the necessary criminal act; whether that word in the connection in which it is used shows "how the misapplication was made and that it was an unlawful one."

Undoubtedly, the phrase "converted to his own use" has a definite and settled technical meaning in the law, although it describes acts of more than one kind. Briefly, it may mean either an unauthorized taking possession of the personal goods of

another for one's own purposes, or an unauthorized dealing with the personal goods of another already in the possession of the one charged with the conversion, including in the latter sense a mere wrongful refusal to deliver on demand. In other words, so far as the act is concerned, as distinguished from the intent, it includes both such a taking as is found in larceny, and such an appropriation of property already in possession as is found in embezzlement. Whether this double meaning would render the use of the word an insufficient description of the criminal act, in an indictment which did not allege whether or not the accused had possession of the goods, it is not necessary to determine here, for the word as used in the present indictment cannot be construed in its technical common law sense.

In the first place, while the phrase "converted to his own use" is a technical expression with a technical meaning, the phrase "converted to the use of another" is modern and anomalous, and cannot be said to have a settled technical meaning in the law. To attempt to supply such a meaning by analogy of the accepted phrase is to undertake to do by inference what must be done by express and unambiguous statements.

But the most serious difficulty is that the word "convert," as a technical legal term, like "embezzle," or "take, steal, and carry away," or "abstract," can be applied only to tangible personal property of which actual possession can be taken or had. An examination of the present indictment shows that the word "converting" is not there used in any sense limited to such property.

The three counts on which the defendant was convicted, which are the three counts here material, are exactly alike except in the allegations of date and amount. Each of them as a part of the inducement alleges, with some care and detail, that the South Danvers National Bank had an account and credit with the Suffolk National Bank of Boston, and from time to time made deposits to the credit of its said account, and charged its said account for moneys, funds, and credits paid and applied by the Suffolk Bank for the use and purposes of the South Danvers Bank. The description of the property misapplied in the first count, which may be taken as an example, was as follows:—

certain money of said The South Danvers National Bank, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents,
certain funds of said The South Danvers National Bank, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents,
said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents,
certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents,
a certain credit of said The South Danvers National Bank, to the amount and of the value of three thousand five hundred and thirty-seven dollars and ninety-two cents,
a certain credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston to the amount and of the value of three thousand five hundred and thirty-seven dollars and ninety-two cents,

a more particular description of said money, funds, credit and credits being to said jurors unknown.

The count alleges that the property thus described was misapplied "by converting said money, funds, credit and credits and each thereof" to the use of Dickinson. The word "converting" as thus used must necessarily be taken in a sense which is applicable to credits as well as to money and funds. As the word "convert" in its technical sense can be applied only to personal goods, of which possession can be taken or had,—property of the kind for which an action of trover could be maintained,—it cannot be construed in that sense here, for in that sense there can be no such thing as the conversion of a credit.

Since the word cannot be understood in the only sense in which it has any accurate or settled meaning, either in the law or in common usage, it remains wholly a matter of conjecture what meaning the grand jury attached to it, and it adds nothing whatever to the word "misapply." In any sense which can be given it, the whole expression "by converting to the use of Dickinson" has exactly the same defects as the words "wilfully misapplied." It does not specify the act, but merely characterizes it. In the connection in which it is used the expression will not bear any construction which would make it a full, exact, and definite description of a criminal act,—an averment showing "how the misapplication was made," from which the Court could determine as a necessary conclusion of law that it was a criminal one.

The case of

Jewett v. *United States*, 100 Fed. Rep. 832,

on which the Government relies, and in which special importance was apparently attached to the word "convert," contains nothing sufficient to answer the foregoing contentions. The material part of the opinion in that case is brief, and may be quoted in full (pp. 837–838):—

Count 84 is based on that provision of section 5209 of the Revised Statutes which reaches an officer or agent of an association who willfully misapplies assets. *Batchelor* v. *U. S.*, 156 U. S. 426, 429, 15 Sup. Ct. 446, 39 L. Ed. 478, repeats emphatically the rule that these words have no settled technical meaning, like "embezzle," also found in the same section, so that they must be supplemented by further averments showing wherein the misapplication was unlawful. But the count in question alleges that the accused did unlawfully, fraudulently, and willfully misapply and convert to his own use the assets of the bank, with intent then and thereby to injure and defraud the association. Then follows the allegation that this conversion was done by some means and in some manner to the jurors unknown. But, having alleged that the accused had unlawfully, fraudulently, and willfully misapplied and converted to his own use the assets of the bank, with intent to injure and defraud the association, no further allegation as to the means or manner was required. What was alleged would clearly have amounted to a charge of embezzlement at common law if the assets had been in Jewett's personal possession, and the allegation that Jewett did convert to his own use shows how the misapplication was made, and that it was an unlawful one, within the requirements of *Batchelor* v. *U. S.* Certainly it cannot be held that an allegation of all the elements which would constitute embezzlement, in the technical sense of the word, if charged against a person who had possession, is not a sufficient allegation of an unlawful misapplication, and of the means of misapplication. We may

therefore reject as surplusage the additional allegation to which the accused objects.

It is not clear from this opinion whether the indictment related only to tangible property, or whether it included credits. If it related only to tangible property, the decision of the Circuit Court of Appeals may perhaps be justified on the ground that the word "convert" could fairly be understood in its technical sense, and therefore alleged either a wrongful taking possession or a wrongful use of property already in possession,—that is, either an abstraction or an embezzlement; though it is submitted that the propriety of such a decision would be open to grave doubt. It might well be argued that the grand jury must not merely use language which describes either an embezzlement or an abstraction, but must allege explicitly that one offence or the other has been committed. However that may be, if the above is the meaning of the decision, it has no application to the present case.

If the indictment in that case referred to credits, the decision clearly cannot be supported merely on the ground that the indictment reads very much like an indictment for embezzlement, the difficulty being, as already pointed out, that the technical meaning of the word "convert," as frequently used in connection with the word "embezzle" in an indictment for embezzlement, cannot possibly be attributed to it in an indictment for the misapplication of credits. It may be added that in no case in which this Court has passed upon an indictment under section 5209 has any special impor-

tance been attached to the use in the indictment of the word "convert"; that no indictment for "wilfully misapplying" has been sustained by this Court which did not go on to allege in detail the acts done which the grand jury characterized as a misapplication; and that one indictment in which the words "converted to his own use" were used has been held by this Court insufficient. This was in

Batchelor v. *United States*, 156 U. S. 426.

In that case the indictment attempted to describe the transactions charged as misapplications, but the Court found the allegations so uncertain and vague that nothing definite could be gathered from them. If the Government's present contention were sound, however, these allegations might have been rejected as surplusage, and left in the indictment every material averment which is found in the present indictment, including the averment that the accused wilfully misapplied $40,422.79 of the moneys, funds, and credits of the bank, and converted them then and there to the use, benefit, and advantage of said Harry F. Batchelor (the accused).

The case of

Evans v. *United States*, 153 U. S. 584,

on which the Government relies, furnishes no authority in support of the present indictment. In that case the indictment stated specifically how the misapplication was made, and the decision was that, having fully described an act by which the bank was made to part with its property without consideration, and having alleged an intent to de-

fraud, the indictment need not expressly enumerate and deny every *honest motive* for the act which might be suggested. In the present case the sufficiency of the allegation of a dishonest purpose is not questioned, nor is it of any importance whether the word "converting" suggests such a purpose. It is the statement of the act, not the averment of the intent, that is defective.

To sum up the foregoing argument, it appears from an examination of the indictment that it attempts to define the criminal act in the words of the statute as a wilful misapplication; that the word "converting" in the connection in which it is used adds nothing to the word "misapply"; that the words "to the use, benefit and advantage of Dickinson" do not necessarily and specifically allege more than that certain money or funds or credits of the bank were, in the course of some transaction not described, transferred to Dickinson; that there is no description of how the misapplication was made from which the Court can determine whether or not it was a criminal misapplication; that the indictment merely expresses the opinion of the grand jury on the effect of the transaction, which includes an opinion on a question of law; in short, that there is no distinct and explicit finding of facts from which the Court can say, as a necessary conclusion of law, that the acts which the grand jury found to have been committed constitute a crime.

Such an indictment fails to comply with the rule expressly and deliberately enunciated by this court for indictments charging wilful misapplication; it violates principles many times clearly and

emphatically stated by this court, and it is difficult to see how a decision holding it sufficient could be reconciled on any logical ground with such former decisions as

United States v. *Cruikshank*, 92 U. S. 542.
United States v. *Mann*, 95 U. S. 580.
United States v. *Hess*, 124 U. S. 483.
Keck v. *United States*, 172 U. S. 434.
Batchelor v. *United States*, 156 U. S. 426.

C. THE RULE REQUIRING THAT THE OFFENCE BE CHARGED WITH SUFFICIENT CERTAINTY TO INFORM THE ACCUSED OF THE NATURE AND GROUNDS OF THE CHARGE AGAINST HIM.

As already pointed out, the indictment has a twofold function, and must not only show clearly and definitely that the grand jury has found an act to have been committed, which, if proved as alleged, would constitute a crime, but must also, in the language above quoted from

United States v. *Cruikshank*, 92 U. S. 542, 558,

"furnish the accused with such a description of the charge against him as will enable him to make his defence." The insufficiency of the allegations in the present case will now be considered from the standpoint of this latter function of the indictment.

The rule requiring for the information of the accused a reasonable certainty in the averments of an indictment was an established rule of the common law, and was deemed of sufficient importance to be incorporated in the Sixth Amendment of the Con-

stitution in the provision that "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." This provision has been construed by this Court, in accordance with the principles of the common law, as requiring that the indictment must set forth the offence "with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged."

United States v. *Cruikshank*, 92 U. S. 542, 558.

In the same case the rule is further defined as follows (p. 558):—

> Where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.

Again on the same page,

> A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances.

Other cases explaining or illustrating this familiar principle are:—

United States v. *Simmons*, 96 U. S. 360.
United States v. *Hess*, 124 U. S. 483.
Batchelor v. *United States*, 156 U. S. 426, 429.

The rule, as the above decisions show, applies equally to common law and statutory offences.

It is evident that this requirement as to certainty for the information of the accused will frequently be violated by the same want of specific allegations in an indictment which constitutes a violation of the other

rule requiring definite averments of facts sufficient to constitute a crime; but the rule now under consideration goes further, and requires, whenever possible, the specification of various particulars of description and identification which might not be necessary to the complete statement of a crime. Thus in

United States v. *Simmons* (above cited),

it was held that an indictment for causing and procuring another person to use a still, boiler, and other vessels in violation of a Federal statute was defective for failure to allege the name of such other person.

This rule as to particularity admits of some modification where the indictment expressly states that the grand jurors are unable to determine the particulars in question. Thus at common law an indictment for larceny must name the owner of the property stolen, but this may be dispensed with if the indictment states that this particular is to the grand jurors unknown. It was intimated in the *Simmons* case that the failure to give the name of the person who used the still by procurement of the accused might have been cured by a similar averment. Indictments under section 5209 have been held sufficient which alleged an intent to defraud some person to the grand jurors unknown.

This exception, however, relates only to mere details of description or identification not essential to a complete and specific statement of the offence intended to be charged.

1 Bishop, New Crim. Proc., sect. 547.

In the present indictment there is no particular description of the moneys, funds, and credits alleged to have been misapplied, nothing being stated by way of identification except the amount. No importance can be attached to the statement of the amount, since it seems to be well settled that allegations of amount and value are not binding, and that the Government may prove another amount than that alleged.

> *Commonwealth* v. *Hussey*, 111 Mass. 432.
> Archbold, Crim. Pl. (23d ed.), 300.

That point need not be further examined, however. The decision in

> *Moore* v. *United States*, 160 U. S. 268, 274–276,

is sufficient to show that the description in the present indictment of the property misapplied is fatally defective, unless the defect is cured by the averment that a more particular description was to the grand jurors unknown.

No satisfactory authority has been found for holding an averment of ignorance on so important a part of the description of the offence sufficient to save the indictment.

It is not necessary, however, to determine this question, since there is a fatal want of certainty in the indictment in another particular, still more important than the description of the property misapplied, and as to which there is no averment of ignorance on the part of the grand jury. The absence of any averments showing how the alleged misapplication was made, has already been dis-

cussed under the preceding heading of the argument. Such averments are not only required by the principles there discussed, but are equally essential to apprise the accused with reasonable certainty of the crime with which he stands charged.

It has been expressly held in cases already cited that the words "wilfully misapply," used in an indictment under section 5209, are insufficient without further averments showing how the alleged misapplication was made. In the *Britton* case, cited and discussed above, this decision was rested chiefly on the ground that those words alone do not necessarily charge a criminal misapplication.

In

Batchelor v. *United States*, 156 U. S. 426,

the statement to the same effect, namely, that the words "wilfully misapply" must be supplemented by further averments showing how the misapplication was made, is rested on the following ground (p. 429):—

> Without such averments there is no sufficient description of the exact offence with which the defendant is charged so as to enable him to defend himself against it, or to plead an acquittal or conviction in bar of a future prosecution for the same cause.

In other words, such an indictment does not inform the accused with the certainty required by law of the nature and grounds of the accusation he is called upon to meet.

Here, as under the preceding head of the argument, the only words in the indictment which can be relied upon as curing the defect are the words

"by converting to the use of Dickinson." For the reasons stated above the word "converting" as thus used cannot be construed in any exact or technical sense. It must be understood in some sense which would be applicable to the misapplication of credits, and no fixed and settled meaning can be attached to it in such a connection. What the grand jury meant by it is therefore wholly a matter of inference and conjecture, and it adds nothing whatever of certainty or definiteness to the charge "wilfully misapplied to the use of Dickinson."

It was also pointed out above that the words "to the use of Dickinson" do not necessarily mean more than that the transaction on which the indictment is founded involved some payment of money or transfer of funds or credits from the bank to Dickinson. This leaves the defendant almost as completely in the dark as to the act intended to be charged as a crime as would the words "wilfully misapply" alone.

In

United States v. *Hess*, 124 U. S. 483 (above cited),

the indictment was under section 5480 of the Revised Statutes, which makes it an offence, "having devised or intending to devise any scheme or artifice to defraud," to place any letter or packet in a United States post-office or take or receive any therefrom in the execution of such scheme or artifice. It was held that, "as a foundation for the charge, a scheme or artifice to defraud must be

stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial." The necessity for a statement of the particulars of an alleged wilful misapplication under section 5209 is certainly at least as great as the necessity for a particular description of the scheme or artifice to defraud under section 5480. But authority directly in point is furnished by the decision in

United States v. *Batchelor*, 156 U. S. 426 (above cited),

and the language of the court in that case quoted above on page 50. The indictment in the Batchelor case at least made some attempt to give an account of the transactions in which the criminal misapplication was charged to have taken place. That indictment contained everything in the way of particulars which the present indictment contains, and in addition gave to the defendant some information, though vaguely and imperfectly stated, to identify the transactions referred to, while the indictment in the present case gives none whatever.

The nature of the offence created by section 5209 is such as to give particular force and application to the rule requiring certainty in the indictment. In the ordinary course of the business of a national bank a great variety of transactions of different kinds, in which money, funds, or credits of the bank are paid or transferred to some other person or made available for his use, take place between

the bank and those with whom, in one capacity or another, it does business. There is scarcely any such transaction, however regular, which might not, by reason of some element present, or suspected or believed to have been present in it, assume in the eyes of a grand jury the character of a criminal misapplication. The cashing of checks, the discounting of notes, the loaning of money, the purchase of securities or other property, or almost any other business transaction, may be the subject of such a charge, and whether any such transaction possesses the elements necessary to make it criminal depends upon such matters as the intent of the parties, the purpose of the transaction, the solvency of persons with whom the bank is dealing, the value of securities, the knowledge of the bank officers on these points,—all matters on which suspicion may be easily aroused and opinions may easily differ. The plainest justice requires that in an indictment under a statute of this character the defendant shall be given some adequate information as to the particular transaction to which the grand jury has attributed a criminal character and the circumstances relied on as giving it that character.

In this respect the indictment in the case at bar could hardly be more completely deficient. Disregarding the allegations of date and amount, as allegations which need not be proved as laid, and disregarding also an immaterial difference between the two forms of expression which in different counts are made to serve for a description of the property misapplied, there is nothing to distinguish one count from another; and in none of them is

there anything to indicate what sort of transaction between Dickinson and the bank the grand jury has seen fit to characterize as a misapplication to Dickinson's use. Any one of the various forms of everyday transactions above referred to might be proved under any count of this indictment, just as appropriately as any other form of transaction. Disregarding entirely any distinction between specific statement and intendment or inference, and giving the fullest effect to all possible implications, no man, lawyer or layman, can from a reading of the indictment form even a conjecture as to what was intended to be charged, except that it was some transaction between Dickinson and the bank, which in the opinion of the grand jury benefited Dickinson improperly, and in which they believed that the parties had a dishonest intent.

Surely, so indefinite a charge cannot be held to be a full compliance with the rule so often enforced by this Court, that the indictment must set forth the offence with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged, and with reasonable particularity of time, place, and circumstances,—a rule incorporated in the Constitution for the more certain protection of citizens accused of crime.

III.

THE VALIDITY OF THE VERDICT FOUND BY TEN JURORS.

The question raised by the last two assignments of error is, in a word, whether in a criminal prosecution under Section 5209 of the Revised Statutes a judgment can legally be entered upon a verdict of guilty found by ten jurors, the defendant having pleaded not guilty and gone to trial before a jury of twelve, but having subsequently consented in writing to the discharge of two of the jurors.

The contention of the defendant on this branch of the case, which was sustained by the judgment of the Circuit Court of Appeals, is based upon the following provision of Article III, section 2, paragraph 3 of the United States Constitution.

> *The trial of all crimes,* except in cases of impeachment, *shall be by jury;* and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

A. PROPOSITIONS ESTABLISHED BY DECISIONS OF THIS COURT.

This provision has already been several times passed upon by this Court, and, except that its boundaries in one direction have not yet been drawn with mathematical precision, its true construction is not now in any important particular an open question. It will greatly assist the discussion of the

arguments advanced by the Government in attacking the decision of the Circuit Court of Appeals, to examine first the propositions which have already been established by the decisions of this Court, and which must therefore be accepted by both sides as the basis of any further discussion. These propositions are believed to be as follows:—

1. The provision of Article III above quoted is not merely the guaranty of a privilege personal to the accused, but is a part of the frame of Government, and as such an imperative definition of the only method by which the offences within its terms may be tried under the authority of the United States.

2. The trial by jury, which the Constitution requires, is the common law trial by a jury of twelve.

3. While there is a class of petty offences which are not to be regarded as within the scope of this provision, its application is not confined to felonies, nor to offences punishable by confinement in the penitentiary, and includes those classes of misdemeanors which, by reason of the nature of the offence and the amount of the punishment prescribed, must be classed as serious rather than petty offences.

The cases which establish these propositions will now be examined.

1. Article III a Peremptory Requirement of the Frame of Government.

The distinction between a guaranty of a personal right and what is called in

Schick v. *United States*, 195 U. S. 65, 72,

a constitutional or statutory mandate, is familiar to our jurisprudence and has frequently been recognized by this Court. Many of the constitutional requirements, both for civil and for criminal proceedings, are by established construction intended merely to secure to the individual a personal privilege, which he may enjoy if he chooses to insist upon it, and which he may equally dispense with. Most of the rights secured by the Sixth Amendment are of this character, as, for example, the right to a speedy and public trial, the right to an impartial jury, and the right of the accused to be confronted with the witnesses against him and to have the assistance of counsel for his defence. The same is true of the right of trial by jury given by the Seventh Amendment in civil cases at common law. On the other hand, certain requirements of criminal procedure, whether expressly enjoined by the Constitution or by statute, or founded merely upon the common law, are held to be peremptory in their character, and binding alike upon the parties, the courts and the officers of the law; and compliance with them is essential to the jurisdiction of the court and the validity of the proceeding. Such, for example, is the requirement of the Fifth Amendment, that no person shall be held to answer for an infamous crime unless on the presentment or indictment of a grand jury. In

Ex parte Bain, 121 U. S. 1,

where the question involved was the validity of an indictment amended by the prosecuting officer with the consent of the court, and without any objecton

on the part of the defendant, this Court declared that an indictment found by the grand jury

> was indispensable to the power of the court to try the petitioner for the crime of which he was charged;

that, after the amendment of the indictment, all jurisdiction of the offence was gone, and that the prisoner, who had been convicted, was entitled to his release on *habeas corpus*.

See to the same effect

Ex parte McCluskey, 40 Fed. 71,

and a full collection of authorities in *Ex parte Bain*, supra.

Again in

Hopt v. *Utah*, 110 U. S. 574,

a statutory requirement that the accused be personally present at all stages of his trial was held to be of the same character, the Court holding that

> It was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. . . . If he be deprived of his life or liberty without being so present such deprivation would be without that due process of law required by the Constitution.

A common law requirement, the observance of which is similarly held to be indispensable to the jurisdiction of the court, is the requirement that the accused shall be arraigned or plead to the indictment.

Crain v. *United States*, 162 U. S. 625.

An example of the other class of provisions is furnished by

Bank of Columbia v. *Okely*, 4 Wheat., 235, 244.

That case involved the validity of a statute of Maryland, which had become a part of the law of the District of Columbia, providing for the summary collection of negotiable paper made or endorsed to the bank, with a further provision for trial by jury at the request of the defendant. In holding the statute to be valid, the Court said:—

> That this view of the subject is giving full effect to the Seventh Amendment of the Constitution is not only deducible from the general intent, but from the express wording of the article referred to. Had the terms been that "the *trial* by jury shall be preserved," it might have been contended that they were imperative, and could not be dispensed with. But the words are, that the *right* of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducta*, and the benefit of it may therefore be relinquished.

That the provision of Article III as to trial by jury belongs to the class of peremptory requirements, and not to the class of personal guaranties, is well settled by authority; and the nature of the requirement, its place in the Constitution and the language in which it is expressed, all justify and enforce the conclusion.

The first authoritative determination of the question is found in

Thompson v. *Utah*, 170 U. S. 343.

The defendant in that case was charged with an offence committed while Utah was still a territory,

and was tried after Utah became a state before eight jurors under a provision of the Utah Constitution authorizing such trial. His conviction was held void by this Court on the following grounds (p. 355):—

> In our opinion the provision in the Constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the territory became a state, because, in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offence, the right to be tried by a jury of twelve persons, *and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.*

On page 353 the Court says:—

> It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.

After quoting from

Hopt v. *Utah*, 110 U. S. 574,

the Court proceeds (near the bottom of p. 354):—

> If one under trial for a felony the punishment of which is confinement in a penitentiary could not legally consent that the trial proceed in his absence, still less could he assent to be deprived of his liberty by a tribunal not authorized by law to determine his guilt.

The peremptory character of this provision of the Constitution had been discussed by Judge Story some sixty years earlier in the Circuit Court case of

United States v. *Gibert*, 2 Sumner, 19.

The question in that case was whether it was error after the accused had pleaded not guilty to omit the ancient inquiry how he should be tried. The omission was held immaterial on the following ground (p. 69):—

> I am clearly of opinion, that the form is wholly unnecessary under the constitution and laws of the United States, in the federal courts. The constitution has expressly declared, "that the trial of all crimes except in cases of impeachment shall be by jury." It is imperative upon the courts, and prisoners can be lawfully tried in no other manner.

On page 71 the court says:—

> And if the prisoners had refused to consent, the trial must have been in the same manner precisely as it has been had. But I confess for one, that I deem it little short of an absurdity in the courts of the United States to call upon the prisoners, after they have pleaded not guilty, to say how they will be tried, when the constitution and laws have peremptorily required the trial to be by jury. Suppose the prisoners had been asked, how they would be tried, and they had answered that they wished for no trial at all; must not the Court have proceeded to try them upon the plea of not guilty? Suppose they had answered that they wished to be tried by the Court, could the Court have tried the cause otherwise than by jury? Suppose they had been silent as to how, and when, and whether, they should be tried, could the Court have done otherwise than order a trial by jury?

And again on pages 71-72,—

> The constitution decides how he shall be tried independently of any election on his part.

In a series of lectures on the Constitution delivered in 1889 and 1890 by Mr. Justice Miller and published shortly after his death, the proposition is stated as follows:—

> You will see that the paragraph in Article III, above quoted, differs in its language from that which we have already considered in regard to trial by jury in civil cases as prescribed by Article VII of the Amendments. In the latter Article it is the mere right to demand the trial by jury which is guaranteed, and the parties may waive that right either by express agreement or by failing to demand a jury, while the language used in Article III is peremptory that "the trial of all crimes, except in cases of impeachment, *shall* be by jury." This language excludes all other modes, whether with or without the consent of the party.

Miller on the Constitution, pp. 499–500.

The principle received passing recognition in the comparatively recent case of

Queenan v. *Oklahoma*, 190 U. S. 488, 551.

In that case it appeared in the course of the trial that one of the jurors had been convicted of an offence which the Court assumed would on challenge have disqualified the juror from serving. In this connection the opinion of this Court contains the following significant though incidental statement:—

> The Court asked the counsel for the prisoner what they desired to do, and its intimation indicated that if the objection was pressed the juror would be excused. *This, of course, meant that the trial would have to be begun over again.*

In the latest case on the subject,

Schick v. *United States*, 195 U. S. 65,

the character of the requirement of jury trial in Article III as a "constitutional mandate" is expressly recognized, and the waiver of jury trial in that case is upheld only on the ground that the offence in question was not within the terms of Article III.

The peremptory character of Article III appears to be fully established by the authorities, and was not directly questioned by the Government in the argument before the Circuit Court of Appeals, but the attempt was made to construe the additional and supplementary provisions of the Sixth Amendment as substituted for and virtually repealing the constitutional enactment in the Third Article. On page ~~36~~ 38 of the brief filed by the Government in this Court the same idea seems to be suggested. A brief consideration of the relations between the two provisions is therefore necessary to a full discussion of the subject.

The Sixth Amendment is as follows:—

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The following discussion of the character and purpose of this provision is taken from the opinion of the Circuit Court of Appeals in this case (Record, pp. 175–176):—

> The United States press on us that the Amendments Articles V. and VI. modify, on the question we are considering, Article

III. of the Constitution as originally adopted. We find no authority in support of this proposition. The Amendments, as we have said, touch some matters which, by their very nature, are of such a character that a person accused may waive them. They also include other matters which, by their very nature, cannot be waived; as, for example, the requirement of an investigation by a Grand Jury with regard to infamous crimes seems to be settled in *Callan* v. *Wilson*, 127 U. S. 540. This requirement, like those of Article III. directing a jury and fixing the place of trial, relates to the frame of government, and therefore it is not subject to the control of the parties. The only expressions we find in the decisions of the Supreme Court relating to this subtopic are in *Schick* v. *United States*, 195 U. S. 65, 68, and in *Callan* v. *Wilson*, at page 549. *Schick* v. *United States* determines nothing, because it merely says that, "if there be any conflict" between the Amendments and the Constitution as originally adopted, "the Amendments must control" under the well understood rule that "the last expression of the will of the law maker prevails." On the other hand, the opinion in *Callan* v. *Wilson* states definitively that "there is no necessary conflict."

The observations in the opinions of the Supreme Court seem to be in complete harmony with the generally accepted rule, to the effect that, while the original Constitution relates to the frame of government, the Amendments are in the nature of a "Bill of Rights," which, of course, is understood to be in the interest of the citizen or subject, and, therefore, *prima facie*, more or less under his control and subject to waiver. The Amendments are described in the first edition of Story's Commentaries on the Constitution, § 1776, and in the third edition of the same work at §§ 303 and 1857, and in Cooley's Constitutional Limitations, 7th ed., at page 365, as a "Bill of Rights." Story points out that the Constitution was not supposed to contain any bill of rights, and that no objection to it was proclaimed with more zeal, and pressed with more effect, than the want thereof. The Growth of the Constitution, by Meigs (1900), which, so far as we have examined it, appears to be correctly stated, and which is a convenient handbook with refer-

ence to the work of the Constitutional Convention, points out at pages 250 and 314 that the Constitution as originally adopted contained no bill of rights, and that the Convention being divided on the question, all attempts to frame one were dropped. Indeed we might dispose of this entire subtopic by reference to the opinion in *Robertson* v. *Baldwin*, 165 U. S., already referred to, according to what appears therein at page 281 as follows:

"The law is perfectly well settled that the first ten Amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case."

So far, therefore, from this proposition on the part of the United States impressing us, it indicates why it is that the constitution of a jury in criminal cases as to numbers as known to the common law is a matter of governmental regulation, while several things which are secured by the Amendments, and which may be waived by an accused person, are of a different character. It also assists in explaining the fact that, in accordance with the rules of the common law, some things may be waived, as, for example, the qualification of a particular juror or the right to a speedy trial, while it does not follow that, by analogy, a waiver may extend to any part of the provisions of Article III. of the original Constitution applicable hereto.

The purpose and principal effect of the first clause of the Amendment is evidently to add to the requirement of a jury trial in Article III a guaranty for the benefit of the accused that the trial shall be speedy and public, the jury impartial, and drawn from the state and district in which the crime is

claimed to have been committed. This is pointed out in

Callan v. *Wilson*, 127 U. S. 540, at p. 549,

and the Amendment is so treated by Mr. Justice Miller, in the lectures above referred to.

Miller on the Constitution, p. 507.

Indeed, *Callan* v. *Wilson*, supra, contains an authoritative determination that the Sixth Amendment was not intended to supplant that part of the Third Article which relates to trial by jury, and there seems to be no authority whatever for the contrary view.

In cases within the terms of Article III, therefore, it is that Article which requires that the trial shall be by jury, and the Amendment merely assures the accused the right to enjoy certain incidents of jury trial, most of which at least, under that provision as at common law, are unquestionably in the nature of privileges which the accused may waive.

Article III, however, provides for the trial of "all crimes," while the language of the Amendment is "all criminal prosecutions." It would seem from the case of

Schick v. *United States*, 195 U. S. 65 (above cited),

that, as a result of this difference in phraseology, the Sixth Amendment has also an independent operation in that class of petty offences to which it is held that Article III does not apply, but the prosecution of which is regarded as a "criminal prosecution" within the language of the Sixth Amendment;

and that in that class of offences the Amendment furnishes to the accused a guaranty of the *right* of jury trial, if he chooses to insist upon it. The distinction in the character of the two provisions is plainly recognized in that case. The defendant had been tried by a District Court without jury by agreement between himself and the prosecuting officer. In determining whether his conviction under these circumstances was valid, the Supreme Court first considered whether the offence of which he was charged came within the scope of Article III, and having reached the conclusion that it did not and the further conclusion that there was no act of Congress and no public policy forbidding the waiver of a jury in the trial of petty offences not covered by Article III, the Court then referred to the Sixth Amendment as giving the accused *a right* to a jury trial, but held that that right may be waived. This conclusion was rested on the ground that,—

> When there is no constitutional or statutory mandate and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy (p. 72).

Article III is thus referred to as a constitutional mandate, while the Sixth Amendment is regarded as dealing with privileges which the accused is given the right to enjoy.

2. The Constitutional Jury a Jury of Twelve.

In accordance with the general rule, by which common law terms used in the Constitution are to be construed in their common law sense and with the incidents and attributes thereto historically

attaching, it has always been understood that the trial by jury referred to in the Constitution means such a jury trial as was known to the common law. This principle receives striking illustration, in respect to matters other than the number of jurors, from the case of

Capital Traction Co. v. *Hof*, 174 U. S. 1.

That a common law jury, and therefore a constitutional jury, is a jury of twelve and no less, was decided in

Thompson v. *Utah*, 170 U. S. 343 (above cited).

On page 349 the Court said:—

> Assuming, then, that the provisions of the Constitution relating to trials for crime and to criminal prosecutions apply to the Territories of the United States, the next inquiry is whether the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. This question must be answered in the affirmative.

After citing English authorities, the opinion proceeds, on page 350:—

> It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offence of grand larceny in the Territory of Utah,—which was under the complete jurisdiction of the United States for all purposes of government and legislation,—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons.

To the same effect is

Rassmussen v. *United States*, 197 U. S. 516.

The same principle, as applied to the situation presented when a juror is excused during the trial, received significant though incidental recognition in the passage from

Queenan v. *Oklahoma*, 190 U. S. 488, 551,

quoted above on page 62. The decision in that case that the disqualification of jurors is not a matter going to the jurisdiction of the Court, but a matter of personal right which the accused may waive, rests upon the established practice of the common law, and there is no mandate or provision of the Constitution which it could possibly be held to violate. The distinction between that question and the question of the number of jurors is plain, and is clearly recognized by the Court in the opinion.

In

Maxwell v. *Dow*, 176 U. S. 581,

the question was whether the Fourteenth Amendment had the effect of making the provisions contained in the first ten amendments operative in the State courts, including the provisions as to indictment for infamous crimes and trial by jury in civil and criminal cases. The Court held that those provisions were not thus made binding on the States, and that a provision in the Constitution of the State of Utah for trial by eight jurors did not violate the United States Constitution. Before reaching this conclusion, however, and in the course

of defining the question presented, the Court said on page 586:—

> That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution, there can be no doubt. *Thompson* v. *Utah*, 170 U. S. 343, 349, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620. And as the right of trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be an unanimous verdict of twelve jurors in all Federal courts where a jury trial is held. *American Pub. Co.* v. *Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; *Springville* v. *Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 816.

The decisions of State courts, some of which will be collected below, and the language of jurists and text-writers, both English and American, and indeed the entire body of authority on the subject, are to the same effect.

3. The Offences Included within the Scope of Article III.

The language of Article III, to the effect that the trial of "all crimes" shall be by jury, might conceivably have been construed as applying to every offence criminally prosecuted under the authority of the United States. The words would have borne that construction, and the result would have involved no departure from the strict rule of the common law. Excluding of course from the present discussion such ancient and obsolete institutions as that of the ordeal, the common law in the strict sense knew no mode of trial except by jury. Trial by magistrate without jury existed only by force of acts of parliament directing that mode of trial for

particular offences. Such statutes, like all acts of parliament, were, of course, of paramount authority in the English constitution. But, where the statutes creating offences did not prescribe the mode of enforcement, the necessary result was, as stated by Blackstone, that "they fall of course under the general rule and can only be convicted by indictment or information at the common law."

IV Bl. Com. 283.
Queen v. *Sturney*, 7 Mod. 99.

It is generally understood, however, that in construing the Constitution, we are to look not merely to the common law in the strict sense, but to the law of England as it existed when the Constitution was adopted, including those modifications of the original common law by act of parliament which had become firmly implanted in the traditional jurisprudence of the country. For centuries before the adoption of our Constitution it had been customary in England, by authority of the acts of parliament referred to, to try a large class of minor offences before the justices of the peace without jury. The offences thus tried were offences created and defined by parliament, and were in general in the nature of police regulations. This Court, therefore, construed the phrase "all crimes" in Article III of the Constitution, not as intended to include all offences prosecuted in the criminal courts, but as excluding a certain class of minor or petty offences.

Callan v. *Wilson*, 127 U. S. 540.
Schick v. *United States*, 195 U. S. 65 (both cited above).

It is not easy to draw the line with absolute accuracy. By the statute of 11 Henry VII, ch. 3, very broad jurisdiction was given to the justices of the peace, but the powers thus given were so abused, and the results so injurious to the liberty of the citizen, that the act was repealed in the first year of Henry VIII. Thereafter the English statutes giving jurisdiction to justices of the peace to try offences without jury were not general enactments relating to defined classes of offences, but specific acts, dealing with specific offences. The first statute under which a recorded case of summary conviction has been found is that of 33 Henry VIII, ch. 6, against the practice of carrying "daggs," or short guns. The jurisdiction gradually grew to considerable proportions by the addition of specific offences by acts of parliament, but it was not until the Summary Jurisdiction Act of 1879 that jurisdiction was made to depend upon a classification of offences by generic statutory definition.

The foregoing statement of the growth of summary jurisdiction in England is based on the very clear outline found in the Introduction of Paley's Summary Conviction.

To attempt to define the word "crimes," as used in Article III, by reference to the precise offences triable in England at the time of the adoption of the Constitution before justices of the peace without jury, would be logically impossible. Whether a modern police regulation describes a "crime" in the constitutional sense can hardly depend on whether in 1789 a similar offence was defined by statute in England and assigned to

the summary jurisdiction of justices of the peace. But if from the operation of the many special statutes dealing with particular statutory offences it resulted that offences of a certain class were pretty generally triable without jury, and if these offences were of such a kind that a definition of the word "crime" which excluded them would be logically defensible, those circumstances would have a legitimate bearing on the construction of the constitutional provision.

It appears from Blackstone's discussion of the subject that the offences tried by summary proceedings fell in a general way into two classes.

IV Bl. Com., p. 280 *et seq.*

The first includes offences and frauds against the excise and the revenue. These in their moral aspects were regarded in the popular estimation in a very different light from violations of the general criminal law, and the prompt and summary enforcement of statutory penalties was considered absolutely necessary for the due collection of the public moneys. The second class included the infliction of

> divers petty pecuniary mulcts and corporal penalties denounced by act of parliament for many disorderly offences, such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others.

It is impossible to draw the line of traditional English practice by any more precise definition. It was certainly not the line between felony and misdemeanor in the technical common law sense,

the great bulk of common law misdemeanors being indictable offences which must be tried by jury. While parliament had power to extend the summary jurisdiction of magistrates over any and all classes of offences, and while there was some irregularity in the exercise of this power, it is evident that the growth of the summary jurisdiction had, after all, an underlying principle. In matters of minor police regulation the procedure by indictment and trial by jury was needlessly slow, inconvenient, and cumbrous. To have required every petty offender to await a session of court and be tried with all the formality of common law jury trial would have overburdened the judicial machinery, while being oppressive rather than merciful to the offender. It was undoubtedly such considerations which led to the enactment of statutes for the summary trial of such offences. On the other hand, there is no reason to doubt that in regard to more serious offences involving heavier penalties, trial by jury continued to hold its traditional place in the mind of the nation as the chief bulwark of personal liberty; and the acts of parliament did not in general encroach upon this principle. In construing the word "crimes" in Article III, so far as its construction depended upon the history of summary conviction in England, this Court could do no more than adopt the principle which thus underlay the legislation of parliament, and frame the nearest possible approach to a general definition of the kind of offences customarily assigned to the summary jurisdiction. This

is understood to be what was meant by the following language in *Callan* v. *Wilson*, supra (p. 549):—

> The third article of the Constitution provides for a jury in the trial of "all crimes, except in cases of impeachment." The word "crime," in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offences of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offences punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a "crime" within the meaning of the third article, or a "criminal prosecution" within the meaning of the Sixth Amendment.

It was accordingly held that

> Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority, of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged (p. 557).

In

Natal v. *Louisiana*, 139 U. S. 621,

the plaintiffs in error had been convicted in a recorder's court of the city of New Orleans for keeping a private market within six squares of a public market, in violation of a city ordinance passed

by authority of a State statute. The maximum penalty was a $25 fine, and in default of payment thirty days in jail. The plaintiffs in error contended that in being tried without jury they had been deprived of the rights guaranteed them by the Fourteenth Amendment of the Constitution.

The case might have been disposed of on the principle afterwards decided in *Maxwell* v. *Dow*, supra, that the Fourteenth Amendment did not extend the provisions of the United States Constitution as to trial by jury to the courts of the States. The Court chose to decide it, however, on the ground that the regulation and control of markets for the sale of provisions are matter of municipal police which the legislature may intrust to a city council; that the ordinance in question was valid, and that "a breach of such an ordinance is one of those petty offences against municipal regulations of police which in Louisiana, as elsewhere, may be punished by summary proceedings by a magistrate, without trial by jury," citing the Louisiana Constitution, Louisiana cases, and *Callan* v. *Wilson*.

In

Schick v. *United States*, 195 U.S. 65 (above cited),

the same decision was reached as to trial without jury in the District Court of persons accused of violating section 11 of the act of August 2, 1886, known as the Oleomargarine Act (24 Stat. 209; U.S. Comp. Stat. 1901, p. 2228). That section imposed a penalty of $50 for the knowing purchase

or receipt for sale of oleomargarine not branded or stamped according to law. The opinion says (on pp. 67, 68), after referring to the $50 penalty:—

> So small a penalty for violating a revenue statute indicates only a petty offence. It is not one necessarily involving any moral delinquency. The violation may have been the result of ignorance or thoughtlessness, and must be classed with such illegal acts as acting as an auctioneer or peddler without a license, or making a deed without affixing the proper stamp. . . . In such a case there is no constitutional requirement of a jury.

After discussing in support of this last proposition the meaning of the word "crimes" as used in Article III of the Constitution, the Court concludes that portion of the opinion relating to this point as follows (p. 70):—

> But we need not go beyond the express rulings of this court. In *Callan* v. *Wilson*, 127 U. S. 540, reference was made to many decisions of State courts, holding that the trial of petty offences was not within any constitutional provision requiring a jury in the trial of crimes; and on p. 557 it was said:—
>
> "Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority, of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged."

Reference may be made in passing to an unusual use of the word "misdemeanor" in the *Schick* case. On page 68 the Court says:—

> The truth is, the nature of the offence and the amount of

punishment prescribed rather than its place in the statutes, determine whether it is to be classed among serious or petty offences, whether among crimes or misdemeanors. Clearly both indicate that this particular violation of the statute is only a petty offence.

In thus opposing "misdemeanor" to "crime" instead of to "felony," as is the more regular use, the Court was evidently following the language quoted from Blackstone, on page 69 of the opinion, to the effect that properly speaking "crime" and "misdemeanor" are mere synonymous terms but that

in common usage the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of "misdemeanors" only.

It is evident from the entire opinion that the word "misdemeanors" is used as synonymous with "petty offences," the latter words being used in the same sense as in *Callan* v. *Wilson*.

While the line thus drawn between crimes and petty offences can hardly be defined with mathematical precision, the foregoing decisions indicate plainly the general principles governing the classification, and have carried the definition far enough to answer authoritatively any question that can be raised on that point in the case at bar.

B. APPLICATION TO THE PRESENT CASE.

1. Question of Waiver Immaterial.

Assuming as the basis of the discussion the propositions which thus appear to be established, it remains to consider their effect upon the issue of the present case.

In the first place, it follows necessarily from the character of the provision in Article III, as a peremptory direction of the only lawful mode of trial, that, if the constitutional requirement is not complied with, no waiver or agreement by the accused can give any validity to the proceedings. This point will be more fully elaborated than would otherwise be thought necessary, because both the argument of the Government, as set forth in its petition for *certiorari* and brief in support thereof, and the dissenting opinion of Judge Aldrich in the Circuit Court of Appeals, suggest a failure to appreciate the nature and effect of such a requirement.

Page 1 of the petition for *certiorari* states the question at issue to be whether the respondent, under substantially the circumstances of the present case,

> can have judgment against him arrested on the ground that he has been deprived of a constitutional right which he could not waive.

The same language, though coupled with an alternative form of statement, is used on p. 4 of the brief filed by the Government for this argument. Such a statement approaches the question from the wrong point of view, and seems to assume that the

Constitution can be or contain nothing except a bill of rights. The case depends upon something more fundamental than any mere right of the accused. The language quoted ignores the vital distinction between a provision of the frame of Government defining the only method by which the courts of the United States have any jurisdiction to try crimes against its authority, and a provision merely guaranteeing a personal right to the individual. To adopt the language above quoted from

Bank of Columbia v. *Okely*, 4 Wheat. 235, 244,

a provision of the latter class is placed on the footing of a *lex pro se introducta*, and the benefit of it may therefore be relinquished. But, when the provision in question is a peremptory limitation of the power and jurisdiction of the Court, the language of waiver has no application whatever, the defendant and the district attorney having no more power than any other individuals to give legal effect to a form of procedure which they undertake to substitute for that exclusively authorized by the Constitution.

This is very forcibly expressed by Judge Putnam in the opinion of the Circuit Court of Appeals (Record, p. 170).

> On the other hand, the provisions of section two of Article III. are peremptory in form, and point out absolutely the tribunal which must dispose of the crimes to which they refer. They cover nothing except what concerns the public interests, as well as personal liberty. The Article in unqualified terms establishes the tribunal. Inasmuch as the public, as well as the persons charged, have always an interest in what tribunal shall dispose of prosecutions for high crimes, it would appear

prima facie that no prosecuting officer nor any person accused, whether acting separately or by agreement, can substitute another locality or another tribunal for that which the letter of the Constitution designates.

The tribunal pointed out by Article III. consists of a jury, and, by necessary implication, of a court established under the Constitution and the laws, with a judge or judges appointed also according to the Constitution and the laws to preside therein. We have said that there is no authoritative determination with reference to the topic before us; but the jury to be empanelled for a criminal cause within the meaning of the Constitution has been directly and authoritatively determined in *Thompson* v. *Utah*, 170 U. S. 343, to consist of twelve. With the aid of this determination, the third Article points out perfectly the elements of the tribunal authorized to proceed against persons accused of crimes like that before us, including equally the court, the judge and the jury, and the number composing the jury. Has any one other than the makers of the Constitution, or those authorized to amend it, the power to substitute for what is thus declared? No one has ever conceived an affirmative answer as to the court or judge; and the apparent answer as to the jury would also be in the negative.

The requirement of jury trial in Article III, like any other equally mandatory provision, is not fundamentally the grant of a right at all. The defendant not only *may* be tried by jury, but, if he is tried at all, he *must* be so tried. He has no choice in the matter. In the language above quoted from Judge Story, "the Constitution decides how he shall be tried independently of any election on his part."

United States v. *Gibert*, 2 Sumner, 19, 72.

No doubt the framers of the Constitution believed that such a requirement would tend to the protec-

tion of persons accused of crime, and no doubt it may be said that the accused has a "right" to that mode of procedure, but it is a right arising merely from the fact that that mode of procedure is exclusively prescribed. The failure to assert such a right does not relieve the courts of their obligation to follow the only constitutional mode of procedure. To say, therefore, that the question is whether the accused has been deprived of a right which he could not waive is a loose and inaccurate statement, which tends to confuse the real issue. Admitting that whatever element of personal right was involved has been waived by the defendant, the question remains whether the mode of trial which the defendant and the prosecuting officer undertook to adopt is one to which any effect can be given under the Constitution.

The objection is expressed by Judge Cooley, in his Constitutional Limitations, as follows:—

> The infirmity in case of trial by jury of less than twelve by consent would be that the tribunal would be one unknown to the law, created by mere voluntary act of the parties; and it would in effect be requiring to submit to a species of arbitration the question whether the accused has been guilty of an offence against the State.
>
> Cooley, Const. Lim. (7th ed.), 458–459.

In a civil case there is nothing inconsistent with any legal principle in allowing the parties to submit their differences to practically any form of tribunal they may choose to select. The obligation to pay a civil judgment needs no better foundation than a contract between the parties. The enforcement of

the criminal law depends upon very different principles, and penalties for crime can be exacted only by the authority of the Constitution and the criminal laws. In the language of the Court in

Hill v. *The People*, 16 Mich. 351, 357,

(a decision in which Chief Justice Cooley concurred):—

> It would be adding materially to the generally recognized force of the obligation of contracts to hold that a defendant charged with a crime might, without a trial, enter into a binding contract with the prosecuting attorney to go to the penitentiary for a certain number of years in satisfaction for the offence. And yet it would approximate such a position, to hold that he might be bound by a contract providing for a trial before a court or jury unknown to the constitution or the laws, the result of which trial might be to place him in the same penitentiary.

In his dissenting opinion in the case at bar Judge Aldrich sought to avoid the force of this reasoning as follows (Record, p. 176):—

> The doctrine of waiver, as applied to a trial which would be otherwise irregular, is of course not to be narrowly accepted as making an unconstitutional trial valid by contract, but is grounded more upon the idea that the agreement, consent, and conduct of the accused, with respect to a question not affecting the jurisdiction of the court, whereby he induces the court to go forward, and whereby he secures the chance of getting an acquittal, operate as a waiver of the right to raise the objection, in the event of an unfavorable result, that the course adopted was irregular.

This statement of the matter is inapplicable to the present case, because it assumes that the irregu-

larity is "with respect to a question not affecting the jurisdiction of the court." Failure to comply with a peremptory requirement of the Constitution defining the only lawful mode of trial could hardly be called an irregularity not affecting the jurisdiction of the court; and to assume that the requirement of Article III is not of that peremptory character is to assume the very point at issue. Judge Aldrich's proposition being based in effect on that assumption, there is no need to consider it further.

It is evident that the same proposition could hardly be maintained as to defects jurisdictional in character. In the present case, for example, to hold the defendant bound by agreement not to raise the objection would not settle the matter, unless it were further held that the objection could not be considered unless the defendant raised it, which would amount in effect to "making an unconstitutional trial valid by contract." In fact, however, when the objection, as in the present case, goes to the jurisdiction of the court, and the record shows on its face that the proceedings were without validity, the appellate court is in duty bound to recognize the defect of its own motion, and dispose of the case accordingly. This principle was illustrated by the *Schick* case, in which the objection to trial without jury was not raised by either party, but was suggested by the Court, counsel on both sides being requested to file briefs for the assistance of the Court in determining it.

Without trespassing on the patience of the Court by a detailed argument of a point believed to be long since settled by authority, it should be observed

that the decisions construing Article III as making a trial by a constitutional jury indispensable to the validity of the proceedings are supported by logical and historical considerations which not only strongly enforce such a construction, but render any other well-nigh impossible.

In the first place, the body of the Constitution, as pointed out in the passage above quoted from the opinion of the Circuit Court of Appeals, is a frame of government and not a bill of rights. Its purpose was to define the powers of the general government as distinguished from the States, to establish the offices and agencies through which those powers were to be exercised, and, so far as thought necessary, to prescribe the manner of their exercise. It established a judiciary department, just as it established a legislative and an executive department, and it made certain provisions as to the manner in which each department should perform the functions assigned to it. The provision that the trial of all crimes shall be by jury is of this character. Considering the nature of the instrument, creating as it did a new government, and constituting the only ultimate source of authority for any officer or agency under that government, it is difficult to see whence any tribunal could derive authority to try an indictment for crime against the United States in any manner except that expressly prescribed in unqualified and unambiguous language by the Constitution.

In the second place, the conception of the ancient rules of criminal procedure as absolute in their requirements, so that their strict observance was

indispensable to the validity of the proceedings, was deeply rooted in the common law, and extended to formalities which appear to us now of small importance. Nothing was more natural than that men brought up in the atmosphere of the common law should regard the constitution of the tribunal by which crimes should be tried, as a matter for precise and absolute regulation by the law of the land. To have made such a matter dependent on the agreement of the parties would have involved a notable departure from the point of view of the common law toward all criminal prosecutions.

Underlying this traditional point of view was the feudal conception that all free citizens were the king's men, and that their lives and liberty were not their own to dispose of,—a conception that still survives in a modified form. The principle in its modern expression is that the State as the representative of the people as a whole has an interest in the life of its citizens, and in their freedom from such unmerited punishment as would deprive the community of their contribution toward the performance of its labors and the promotion of its well-being.

Finally, the absolute character of the requirement under discussion finds ample justification, if considered merely from the standpoint of protection to the accused. An assertion that a man accused of crime is necessarily competent to judge for himself what form of trial is best adapted to protect him from injustice would be obviously untrue. The community may very properly decide that question by its collective wisdom, and enact that

no man shall be punished in the name of the State who has not had such a trial as the highest wisdom of the community deems best adapted to the ends of justice. This conclusion is still further enforced by the consideration, more than once referred to by this Court, that one on trial under a criminal charge, whether innocent or guilty, is necessarily under a sort of duress, which affects his will and judgment in connection with the proceedings of his trial. To hold him bound by every consent he might give under such conditions and in reference to such a matter might easily result in something very far from justice.

The attitude of the common law is well summed up in the following language of Sir John T. Coleridge in

Regina v. *Bertrand*, L. R., 1 P. C. 520, 534,

> It is a mistake, moreover, to consider the question only with reference to the Prisoner. The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not the interests of either party. This remark very much lessens the importance of a Prisoner's consent, even when he is advised by Counsel. and substantially, not, of course, literally, affirms the wisdom of the common understanding in the profession, that a Prisoner can consent to nothing.

2. The Present Case within the Scope of the Constitutional Requirement.

The offence defined by section 5209 of the Revised Statutes, under which this prosecution was brought, is termed by the statute a misdemeanor. The use of that term is immaterial, however, as

this Court has expressly decided that Article III applies to misdemeanors as well as to felonies.

Callan v. *Wilson*, supra.

It would be equally immaterial if Congress had characterized the offence denounced in the statute as a petty offence, or the statute itself as a police regulation, or had undertaken to provide in so many words that it should not be construed as within Article III of the Constitution. The application of the constitutional provision is for this Court and not for Congress to determine, and, as stated in the *Schick* case, above cited, depends upon "the nature of the offence and the amount of punishment prescribed." The present statute includes offences in the nature of embezzlement and larceny, its violation involves serious moral turpitude, and is punishable (without any alternative of a fine) by from five to ten years' imprisonment, which under section 5541 of the Revised Statutes may be in the penitentiary.

It could hardly be held that an offence which must be prosecuted by indictment under the Fifth Amendment is nevertheless outside the scope of Article III, and this for two reasons. In the first place, any argument based on the common law practice of summary proceedings would necessarily have the same effect on the question of indictment as on the question of jury trial, since the two were equally incidents of the common law method of trial (the only difference being that, while there was a substitute for the indictment, there was

none for the trial by jury), and both were equally dispensed with in the summary proceedings under parliamentary authority. In the second place, it could hardly be held that the words "all crimes" in Article III are not at least as broad in their application as the words "any infamous crime" in the Fifth Amendment. The offence here charged is an infamous crime, which must be prosecuted by indictment.

Ex parte Wilson, 114 U. S. 417.

There is neither logic nor authority for holding that such an offence is not within the requirement of jury trial.

Finally, the present offence is in every respect more serious than the misdemeanor involved in *Callan* v. *Wilson*, to which it was expressly held that the language of Article III applied.

The proposition that this offence is within the terms of Article III was not questioned by the Government in its petition for writ of *certiorari* and brief in support thereof, and it does not seem to be seriously questioned in the Government's brief for this hearing. On page ~~20~~ of that brief it is conceded that the language of Article III included, when the Constitution was adopted, both felonies and misdemeanors as then defined by the law. The only reason suggested for construing it as not including the offence here in question is that Congress has chosen to call the offence a misdemeanor. Even if the mere name given by Congress to an offence could be allowed to determine the operation of the constitutional provision, it is not

clear why calling an offence a misdemeanor should take it outside a provision which from the beginning admittedly applied to misdemeanors.

3. The Constitutional Requirement not Complied With.

The following statement of the Government's position appears on page 9 of the petition for *certiorari*:—

> The Government did not contend that a defendant could, before his trial, agree that the tribunal before which he was to be put upon trial should be made up of a judge and less than twelve jurors, because the defendant would then be consenting to the creation of something which was not a court. What the Government contended was, that if, on the other hand, jurisdiction over the trial is obtained by the organization of a constitutional court, and the court so constituted is subsequently diminished, with the defendant's consent, by one or two jurors, the trial may proceed and a lawful verdict be taken from the jury which has in this way suffered a "fractional loss."
>
> With all deference to the conclusions of the majority of the learned judges of the Circuit Court of Appeals, it is submitted that the error of their opinion lies in the fact that it makes no distinction between an agreement on the part of the defendant to be tried by an illegally constituted tribunal—that is to say, one originally made up in a manner contrary to the requirements of law—and an agreement, after the tribunal has been in all respects legally constituted, to assent to that which, in the apt language of Mr. Justice Holmes in *Interstate Consolidated Street Railway Company* v. *Massachusetts* (207 U. S. 79), may be termed a "fractional loss."

See also pages 25 and ~~37~~ 40 of the Government's brief.

The Government thus concedes that a tribunal which originally included a jury of less than twelve would be "something which was not a court,"

created by the consent of the defendant, "an illegally constituted tribunal—that is to say, one originally made up in a manner contrary to the requirements of law."

It therefore remains to inquire whether the distinction relied on by the Government can be supported on any logical ground, and whether, to adopt a phrase from the petition, less is necessary to *constitute a court* when the verdict is rendered than when the district attorney rises to make his opening statement.

It is believed that, in attempting to draw the distinction above stated, counsel for the United States were under the influence of the same misconception of the question at issue which was pointed out on page 79 of this brief, and were misled by a resulting failure to distinguish between cases arising under the United States Constitution as construed by this court and such cases as

Commonwealth v. *Dailey*, 12 Cush., 80,

which is cited in their petition and brief. That case arose under a provision of the Massachusetts Constitution very differently worded from Article III of the Constitution of the United States, and proceeded distinctly on the ground that the Massachusetts provision is "*lex pro se introducta*," a guaranty of a personal privilege, like many of the amendments to the United States Constitution, including, as shown by the *Schick* case, the Sixth Amendment. It necessarily follows from this construction of the Massachusetts provision that there is no *constitutional prohibition* against a criminal trial in the courts

of that State with less than twelve jurors by consent of the defendant, and this is equally true whether the trial starts with less than that number or a jury originally composed of twelve is subsequently diminished.

Cf. *Jones* v. *Robbins*, 8 Gray, 329, 341.

The objection intimated by Chief Justice Shaw, on page 83 of the opinion in the *Dailey* case, to permitting a trial with less than twelve by consent "unless upon some unforeseen or urgent exigency," was evidently based on considerations of public policy and a natural desire to discourage too easy or frequent a departure from established and time-honored forms. He therefore suggested that the whole matter would be regulated by the discretion of the presiding judge,—a suggestion obviously incompatible with an imperative constitutional requirement. Under the construction thus applied by the Massachusetts court to the State constitution, a distinction such as the government seeks to draw in the present case might be logical, simply because the whole question is treated as one of discretion, and there would ordinarily be no occasion for the exercise of such discretion at the outset of the trial. In other words, under the Massachusetts doctrine, the constitutional objection to a reduction of the number of jurors by consent is *entirely eliminated* on the ground that the constitution merely secures a personal right which can be waived; and the distinction (if any is intended to be suggested) between such reduction in the number at the beginning and a similar reduction at a later stage must be under-

stood to rest on considerations altogether independent of any constitutional prohibition.

But the situation under Article III of the Federal Constitution is entirely different. That article being construed as an absolute constitutional mandate prescribing the only tribunal before which an indictment for crime can legally be tried, it cannot be eliminated from the case by any wish or consent of the defendant, and it goes almost without saying that the defendant and the district attorney cannot any more effectively amend the Constitution at one stage of the trial than at another.

The distinction which the government asserts must be supported, if at all, on a ground which satisfies, rather than dispenses with, the imperative requirement of trial by jury. There would be one possible ground on which, if there were any historical basis for it, such a result might be reached. If there had been under the common law of England, or perhaps that of Massachusetts before the adoption of the Federal Constitution, a practice by which the discharging of one or more jurors by consent in the course of the trial was one of the incidents of the common law trial by jury, it would be logical and in harmony with established principles of constitutional construction to hold that such a practice is a part of the definition of trial by jury as those words are used in the Constitution. A verdict rendered under such circumstances by less than twelve jurors would then be supported, not because the requirement of Article III had been waived by the defendant, but because the defendant

would have had a jury trial within the meaning of that article.

Nothing short of express authority, showing a practice at the common law well established as a customary incident of jury trial, to excuse a portion of a criminal jury during the trial and take a verdict from the remainder, would suffice to show either that the common law permitted a practice so little in harmony with its spirit and with the learning on the subject, or that the Constitution, while making a jury of twelve absolutely essential to a legally constituted tribunal at the beginning of the trial, is satisfied with eleven or ten or six, when the time comes for the jury to render its verdict. In any consideration of the matter the question inevitably suggests itself which Chief Justice Shaw propounded in the *Dailey* case and undertook to answer in the following manner:—

> But it is asked, if consent will authorize a trial before eleven jurors, why not before ten, or six, or one. It appears to us, that it is a good answer to say, that no departure from established forms of trial in criminal cases can take place without permission of the judge, and no discreet judge would permit any such extravagant or wide departure from these salutary forms as the question supposes, nor any departure, unless upon some unforeseen or urgent exigency.
>
> *Commonwealth* v. *Dailey*, 12 Cush. 80, 83.

In commenting on this passage, we cannot do better than to adopt the language of Judge Putnam, appearing on page 173 of the Record:—

> We have been unable to answer satisfactorily the question which he thus asked himself to determine, or to frame any satisfactory rule by which, if the waivers at bar can be sus-

tained, the jury may not be made to consist of one man instead of twelve. The legal mind involuntarily rejects a proposition that the jury might be so constituted constitutionally; and yet we are unable to determine at what point the weakening of the panel should stop unless it might by consent be reduced to a single individual. Chief Justice Shaw likewise finds no solution except the discretion of the judge; but, while necessarily the discretion of the judge is often interposed in administering the civil law, and, to a certain extent, the criminal law, it seems wholly inappropriate that it should be availed of in a matter of so grave a character as the construction and practical application of the Constitution of the United States. We are not able to accept a proposition of that kind.

This conclusion is in harmony with the reasoning of this Court in

Thompson v. *Utah*, 170 U. S. 343, 353.

If, in respect to felonies committed in Utah while it was a Territory, it was competent for the state to prescribe a jury of eight persons, it could just as well have prescribed a jury of four or two, and, perhaps, have dispensed altogether with a jury, and provided for a trial before a single judge.

Such being the logical difficulties which the Government's position involves, it remains to inquire whether there is any evidence to support that position in the only way it could be supported, that is, by showing an established practice to take verdicts from less than twelve jurors as an incident of common law jury trial in criminal cases.

Counsel for the Government have not produced any authority whatever for the existence of such a practice at the common law. In the present case the search of the English authorities has been

prosecuted both by counsel and by the judges of the Circuit Court of Appeals with great industry and thoroughness, and with the same negative result. Not only is this true, but the question has been examined by eminent text-writers and by the courts of nearly every State in the Union, and neither text-book nor decision has been found which suggests that any such practice prevailed at the common law. In the opinion of the Circuit Court of Appeals, Judge Putnam says with entire accuracy of the case of

Commonwealth v. *Dailey*, 12 Cush. 80 (above cited):—

> The opinion of Chief Justice Shaw was based entirely on propositions initiated by himself, or by the court he represented. All the cases cited by him have been carefully examined, and they in no way meet the difficulty here; and he made no claim that they did. The conclusion he reached stood entirely on the force of his own reasoning (Record, p. 172).

Again, in reference to the possible effect of such a practice existing in Massachusetts when the Constitution was adopted, Judge Putnam says (Record, p. 173):—

> For the traditional law of New England we look to Dane's Abridgement, where we are unable to find any trace of a practice supporting the proceedings now in review before us; and Chief Justice Shaw, who certainly would have known of such a practice if there had been any, in no degree rested *Commonwealth* v. *Dailey* on any assumption of that nature.

On the other hand, we have the authority of Chief Justice Cooley, who declares in his Constitutional Limitations that, in case of trial by jury

of less than twelve, "the tribunal would be one unknown to the law," and it appears by the cases cited that in making that statement he had in mind the situation presented when a juror is excused in the course of the trial.

Cooley, Const. Lim., (7th ed.), pp. 458–459.

That situation has arisen in a number of the States and been passed upon in many of their decisions. Some of these follow *Commonwealth* v. *Dailey*, supra, and adopt the view that the provision for jury trial in the particular State Constitution is in the nature of "*lex pro se introducta*" and can be waived. In others the constitutional provision is construed like that of the Federal Constitution as a peremptory direction of the only lawful mode of trial. But in none of the cases is there any suggestion of a common law practice permitting a reduction of the panel, and, wherever the constitutional provision is held to be mandatory, it is treated as beyond question that the provision is violated unless the full jury of twelve concur in the verdict. These cases are collected on page 106 below.

This Court has more than once declared the necessity of twelve jurors concurring in the verdict. See quotations from

Thompson v. *Utah*, 170 U. S. 343,
Queenan v. *Oklahoma*, 190 U. S. 488, 551,
Maxwell v. *Dow*, 176 U. S. 581, 586,

on pages 60, 62, and 70 of this brief, and compare

Hawaii v. *Mankichi*, 190 U. S. 197, 216.

The statements in the English authorities as to the number of jurors either expressly refer to a *verdict* of twelve or contain no suggestion that the number can be reduced at any stage of the trial. See

2 Hale, P. C., 161.
Finch's Law, 400.
Bac. Abr., Tit. Juries, A.
Trials Per Pais, 92 *et seq.*

The note in Forsyth's History of Trial by Jury, page 241, to which Judge Aldrich calls attention in his dissenting opinion (Record, p. 179), clearly refers to civil cases.

Though no explicit authority has been found in the English books, dealing in terms with a waiver of the full number of jurors, there are several cases which discuss the proper course to adopt on the death or serious illness of a juror during the course of the trial, and none of these cases suggests the possibility that the trial might by consent or under any circumstances be continued with eleven jurors, and a lawful verdict rendered.

Rex v. *Scalbert,* 2 Leach, 620.
Rex v. *Edwards,* R. & R. 24.
Regina v. *Beere,* 2 M. & R. 472.
Regina v. *Ashe,* 1 Cox, 150.

Finally, as expressing the attitude of the English law on waiver in criminal trials generally, reference may be made again to the passage quoted on page 87 above, from

Regina v. *Bertrand,* L. R., 1 P. C. 520, 534.

The unyielding strictness with which the common law insisted upon the literal observance of all technical requirements, particularly in the administration of the criminal law, is familiar to any student of the subject. Details of procedure utterly trifling in comparison with the number of jurors, were considered essential to the validity of the proceedings. There are several expressions in the earlier authorities insisting upon the concurrence of twelve jurors in the verdict, some of which have been cited. In the light of these expressions any such practice as we are now considering would have been a surprising departure from the usual rigidity of common law criminal procedure. It is impossible to believe that such a practice could have existed without being mentioned by any of the writers on the subject, ancient or modern, or that in a day when the ingenuity of counsel in raising objections to form and procedure at every stage of the case was certainly not inferior to that of the present day, no counsel for a defendant convicted after such a proceeding would ever have raised the point. It is much easier to believe that the rule stated by the authorities above quoted, that the verdict must be the unanimous verdict of twelve jurors, was understood and accepted by the entire legal community without qualification, and that in a day when the strict observance of forms was so much a matter of course, no departure from that rule was ever attempted.

C. COLLECTION OF STATE COURT DECISIONS.

For various reasons, some of which are suggested below, it was not believed that an elaborate citation of State court decisions on constitutional requirements of jury trial was necessary or would be materially helpful in the argument of the present case. A collection of State cases is here subjoined, however, for the convenience of any of the judges who may care to refer to them.

1. Cases on the Nature of the Requirement of Jury Trial in Criminal Cases.

It must of course be borne in mind that decisions of State courts on this question are based upon the language of their own constitutions, and this language may bear or may require a different construction from that applicable to Article III of the United States Constitution. There are several States in which it is held that the benefit of the constitutional provision may be waived by the accused, the provision being thus treated as "*lex pro se introducta.*" Decisions to this effect are

Commonwealth v. *Dailey*, 12 Cush. 80 (above cited).
Lavery v. *Commonwealth*, 101 Pa. St. 560.
State v. *Worden*, 46 Conn. 349.
Craig v. *State*, 49 Ohio St. 419.
State v. *Almy*, 67 N. H. 274.
League v. *State*, 36 Md. 257.
State v. *Sackett*, 39 Minn. 69.

State v. *Woodling*, 53 Minn. 142.
State v. *Kaufman*, 51 Ia. 578.
Lovilia v. *Cobb*, 126 Ia. 557.
Murphy v. *State*, 97 Ind. 579.
Edwards v. *State*, 45 N. J. Law, 419.
Langbein v. *State*, 37 Tex. 162.
State v. *Ellis*, 22 Wash. 129.

In all these cases, however, the provision of the State constitution was less imperative in form than that of the Third Article of the United States Constitution, and in nearly all the guaranty was expressed in some such language as "the accused shall have *the right*," or "*the right* . . . shall be preserved." Most of the State constitutions also are much more in the nature of a bill of rights than the body of the United States Constitution. Many of these cases follow the authority of the *Dailey* case above discussed, and few, if any, contain any full or satisfactory discussion of the question.

On the other hand, many States hold that the constitutional provision is imperative and cannot be waived, although in many of these cases the language of the constitution is that of the preservation of a right.

Cancemi v. *People*, 18 N. Y. 128, reaffirmed in
People v. *Guidici*, 100 N. Y. 503, 508.
Cf. *Maurer* v. *People*, 43 N. Y. 1.
Swart v. *Kimball*, 43 Mich. 443, 448.
Paulsen v. *People*, 195 Ill. 507.
State v. *Mansfield*, 41 Missouri, 470.

People v. *O'Neil*, 48 Cal. 257.
State v. *Simons*, 61 Kan. 752.
Cf. *Michaelson* v. *Beemer*, 72 Neb. 761.
Arnold v. *State*, 38 Neb. 752.
State v. *Scruggs*, 115 N. C. 805.

2. Cases on the Class of Offences Included within the Constitutional Provision.

It has generally been held, wherever the question has been raised, that the constitutional provision for jury trial, whether construed as a mandate or a guaranty, does not extend to a class of smaller offences. Cases defining the limits of this class are few. The tendency in the State courts, however, is illustrated by the following cases. In

State v. *Mansfield*, 41 Mo. 470,

the Court said that, *in cases of misdemeanor*, by authority of statute,

> the accused may waive a jury or agree on a certain number, but in those offences including capital crimes and felonies which under the Constitution can only be proceeded against by indictment of a grand jury and can only be tried by a petit jury, the jury must be composed of twelve persons.

In

Danner v. *State*, 89 Md. 220,

the Court said, speaking of trial by jury:—

> It is clear that it cannot be demanded in many minor offences. These could always be reached by summary proceedings. . . . It may, however, be stated as a general rule that for any criminal offence for which a person is liable to infamous punishment, a trial by jury cannot be denied him. It cannot be questioned that confinement in the pententiary is an infamous punishment.

In

Paulsen v. *People*, 195 Ill. 507,

the Court said that the test with reference to the requirement of trial by petit jury was whether the offence was necessarily prosecuted by indictment.

> At the common law, trial by jury was enjoyed only by those against whom the accusation was made by indictment. . . . It is this common law right of trial by jury to which our constitution refers, and in the class of cases in which that right existed at the common law, an essential part of the tribunal for the trial of such accusations is a jury.

As the constitution of Illinois expressly made an indictment necessary for offences punishable by imprisonment in the penitentiary, it was held that the provision as to trial by petit jury must be applied within the same limits.

The tests suggested in these three cases are in fact substantially identical, and are so understood by the courts. "Misdemeanor" is defined by statute in Missouri and in most of the States as including offences not punishable by death or imprisonment in the penitentiary. See collection of statutes in

Mackin v. *U. S.*, 117 U. S. 348.

And authorities are generally agreed that punishment in the penitentiary marks the line of infamous crimes and infamous punishments, in accordance with the decisions in

Ex parte Wilson, 114 U. S. 417.
Mackin v. *U. S.*, 117 U. S. 348.

An examination of the cases which, in considering

what the constitutional provision covers, draw the line at "misdemeanors," makes it sufficiently apparent that the word is used in its modern sense, as designating offences not liable to infamous punishment.

In States in which the constitutional provision is held to be a personal guaranty there is of course no distinction as to waiver between lesser and greater offences. Of the cases cited on pages 100 and 101 above, the *Dailey*, *Lavery*, *Sackett*, *Woodling*, *Lovilia*, and *Langbein* cases were misdemeanor cases; the others were cases of felony.

That the *Lovilia* case does not rest on any distinction between misdemeanor and felony sufficiently appears from the *Kaufman* case in the same jurisdiction.

In the *Sackett* case the Court expressly said that it was unnecessary to distinguish between felony and misdemeanor, as the opinion proceeded on the assumption that the Constitution guaranteed the accused a jury trial if he demanded it.

The case of

Commonwealth v. *Dailey* (supra)

is sometimes cited for the proposition that jury trial can be waived "in misdemeanors." In fact, it is perfectly clear from the language of the opinion that the doctrine of that case applies to all classes of offences; and this is brought out still more plainly by

Jones v. *Robbins*, 8 Gray, 329, 341.

The same is true of the Pennsylvania case of

Lavery v. *Commonwealth* (supra),

and the Texas case of

Langbein v. *State* (supra).

3. Cases on the Question of What Constitutes Trial by Jury.

Only one case has been found in which there is any suggestion that a jury of less than twelve can be a constitutional jury (except where, as in Utah, the constitution expressly provides for a smaller number).

In

State v. *Borowsky*, 11 Nev. 119,

the court took the unique position that, while it was "implied in the Constitution and expressly enacted in the law" that on the trial of an indictment a jury could not be waived, consent to trial by eleven jurors was not a waiver of a jury trial. The court said (on p. 127):—

> There is certainly much apparent and perhaps real force in the argument that trial by eleven jurors is no jury trial, but there is very strong authority for holding the defendant estopped . . . from saying that it is not and . . . it ought to be so held if there is any reasonable ground for such decision.

The Massachusetts case of *Commonwealth* v. *Dailey* is cited as authority for this decision; but the *Dailey* case stands for no such doctrine, and the notion of a jury trial by estoppel does not seem to have appealed to the courts of other States.

In none of the cases which involve the validity of a verdict rendered by less than twelve jurors is any distinction suggested, such as the Government now seeks to draw, between a trial begun

before eleven jurors and one in which the original number of twelve is later reduced. The decision turns in each case upon the character and purpose of the constitutional provision. In the following cases cited above on pages 101 and 102 a juror was excused by consent during the trial, and the verdict of eleven was held void.

Cancemi v. *People*, 18 N. Y. 128.
People v. *O'Neil*, 48 Cal., 257.
State v. *Mansfield*, 41 Mo. 470.
State v. *Simons*, 61 Kan. 752.
State v. *Scruggs*, 115 N. C. 805.

In the following cases, cited on pages 100 and 101, the verdict was sustained under the same circumstances, but on the ground that the constitutional provision in question was merely a guaranty of a personal right, which would be equally applicable to a trial begun with eleven.

Commonwealth v. *Dailey*, 12 Cush. 80.
State v. *Sackett*, 39 Minn. 69.
State v. *Kaufman*, 51 Iowa, 578.
Cf. *State* v. *Ellis*, 22 Wash. 129.

4. Cases Proceeding on Other than Constitutional Grounds.

In some cases the decision that a trial without jury or a verdict of less than twelve is invalid is rested on the ground that the legislature has not authorized such a mode of trial, the constitutional power of the legislature to do so not being decided.

See, for example,

Wartner v. *State*, 102 Ind. 51.

In a good many cases, in fact, it is not clear whether the decision holding the conviction invalid rests on constitutional grounds or on the want of statutory authority, and such cases have not been included in the foregoing collection.

Where statutes have been passed and upheld permitting trial by the court without jury, it has been held that these statutes do not legalize a trial by less than twelve jurors.

Wartner v. *State* (supra).
State v. *Ellis*, 22 Wash. 129.

Respectfully submitted,

POWERS & HALL,
Counsel for the Respondent.

SAM'L. L. POWERS,
HENRY W. DUNN.

Supreme Court of the United States

UNITED STATES,
PETITIONER,

v.

JOHN W. DICKINSON,
RESPONDENT.

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

SUPPLEMENTAL BRIEF FOR THE RESPONDENT.

Certain changes made in the Government's brief after it was first completed ready for filing, and copies furnished to the defense, necessitate the citation of a few additional authorities in behalf of the respondent.

I.

ADDITIONAL AUTHORITIES ON THE QUESTION OF JURISDICTION.

A. CERTIORARI BEFORE THE ACT OF 1891.

The first important change in the Government's brief is the insertion on pages 13 to 15 of a discussion of *"Certiorari at common law and under acts of Congress prior to* 1891."

The Act of 1789, c. 20, sect. 14 (now Revised Statutes, sect. 716) gave to the Supreme Court and the circuit and district courts "power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." The Government cites

In re Chetwood, 165 U. S. 443,

in which a writ of *certiorari* was issued under R. S., Sec. 716, and from the statement in the opinion in that case (p. 462) that "whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice," draws the following conclusion:

> The writ of *certiorari,* therefore, under the Constitution and the statutes of the United States is strictly the common law writ of that name with all its functions and attributes, so far as applicable to our system of jurisprudence. (Government's Brief, p. 14.)

There is nothing in the *Chetwood* case to support this sweeping assumption, and it is sufficiently answered by the opinion of this court in

Ex parte Vallandigham, 1 Wall., 243, 249:

> Our first remark upon the motion for a *certiorari* is, that there is no analogy between the power given by the Constitution and law of the United States to the Supreme Court, and the other inferior courts of the United States, and to the judges of them, to issue such processes, and the prerogative power by which it is done in England. The purposes for which the writ is issued are alike, but there is no similitude in the origin of the power to do it. In England, the Court of King's Bench

has a superintendence over all courts of an inferior criminal jurisdiction, and may, by the plenitude of its power, award a *certiorari* to have any indictment removed and brought before it; and where such *certiorari* is allowable, it is awarded at the instance of the king, because every indictment is at the suit of the king, and he has a prerogative of suing in whatever court he pleases. The courts of the United States derive authority to issue such a writ from the Constitution and the legislation of Congress.

Compare the similar statement as to *habeas corpus* in

Ex parte Bollman, 4 Cranch, 75, 93:

As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States.

Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied. The reasoning from the bar, in relation to it, may be answered by the single observation, that for the meaning of the term *habeas corpus,* resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.

This opinion is not to be considered as abridging the power of courts over their own officers, or to protect

> themselves, and their members, from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals, or between the government and individuals.
>
> To enable the court to decide on such question, the power to determine it must be given by written law.

It may be added that the early English use of *certiorari* in criminal cases described in the authorities cited by the Government, was, as indicated in the above passage from the *Vallandigham* case for the purpose of *transferring the trial* of a criminal case into the King's Bench, not to review in an appellate proceeding for the correction of error a decision of an inferior court in favor of the accused.

Looking then only to the Constitution and the statutes, do we find, as the Government seems to argue, before the Act of 1891, a grant to this Court of appellate jurisdiction to review by *certiorari* for the mere correction of error any or all decisions of the lower Federal courts not otherwise reviewable?

Perhaps the leading case on the appellate jurisdiction of this Court in criminal cases is

United States v. *More*, 3 Cranch, 159,

where the Court said (pp. 172-173):

> In support of the jurisdiction of the court, the attorney-general has adverted to the words of the constitution, from which he seemed to argue, that as criminal jurisdiction was exercised by the courts of the United States, under the description of "all cases in law and equity arising under the laws of the United States," and as the appellate jurisdiction of this court was extended to all enumerated cases, other than those which might be brought on originally, "with such exceptions, and under such regulations, as the congress

shall make," that the supreme court possessed appellate jurisdiction in criminal, as well as civil cases, over the judgments of every court, whose decisions it would review, unless there should be some exception or regulation made by congress, which should circumscribe the jurisdiction conferred by the constitution.

This argument would be unanswerable, if the supreme court had been created by law, without describing its jurisdiction. The constitution would then have been the only standard by which its powers could be tested, since there would be clearly no congressional regulation or exception on the subject.

But as the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described.

This doctrine has been often reiterated. See

Ex parte Yarbrough, 110 U. S. 651, 653,

and the passage quoted from

Cross v. *United States*, 145 U. S. 571, 574,

on page 17 of the original brief for the respondent, and cases cited in those opinions.

Do these decisions mean merely that criminal cases cannot be reviewed *by writ of error or appeal* without express statutory authority, leaving it to be understood that all criminal cases can be reviewed here by *certiorari* under R. S., Sect. 716, for the correction of any error that may have been committed by the lower courts? The contrary was expressly decided in

Ex parte Gordon, 1 Black, 503.

See also

American Construction Co. v. *Jacksonville, etc., Ry. Co.*, 148 U. S. 372, 380,

and cases there cited, and compare

Ex parte Kearney, 7 Wheat., 38, 42-43.

Until the decision of the *Chetwood* case, in 1897, *certiorari* had been issued by this court only as an auxiliary process to supply imperfections in the record of a case already before it. The decision in the *Chetwood* case is explained as follows in

In re Tampa Suburban R. R. Co., 168 U. S. 583, 587:

> In the case of *In re Chetwood*, 165 U. S. 443, 461, we allowed the writ to bring up for review certain final orders of the Circuit Court, *which interfered with causes pending in this court;* and the question of the issue of the writ by this court in the exercise of its inherent general powers, under the Constitution did not arise.

The case of

Whitney v. *Dick*, 202 U. S. 132, 135,

seems to be the first instance of the issue of the writ by this Court as an independent proceeding in a case in which the jurisdiction of the Court had not been invoked by any other process.

What then is the distinction between *Whitney* v. *Dick*, in which the writ was issued to correct an excess of jurisdiction on the part of the Circuit Court of Appeals, and *Ex parte Gordon* in which it was denied for the correction

of error alleged to have been committed in a criminal case? The answer is suggested by this very statement of the effect of the two cases, and is confirmed by the case of

Harris v. *Barber,* 129 U. S. 366, 371-372,

where this Court quoted with approval the following language of the lower court, affirming the decision below on the ground therein stated:

> These averments constitute fully a statement of the relation of landlord and tenant between the parties. Now whether the proof came up to these averments or not cannot be inquired into upon a writ of *certiorari. Certiorari* goes only to the jurisdiction. It does not go to any errors of judgment that may have been committed by the justice in the progress of the exercise of that jurisdiction.

Note also the statement in the *Chetwood* case, above quoted, that the writ may be issued when the circumstances imperatively demand it, "*to correct excesses of jurisdiction,* and in furtherance of justice."

The distinction between preventing excesses of jurisdiction, and the mere correction of error, is an important and fundamental one, always observed in *habeas corpus* cases, and clearly expounded in

In re Bonner, 151 U. S. 242, 256, *et seq.*
Cf. Ex parte Kearney, 7 Wheat., 38, 42 (cited above).

To sum up, then, it would seem that the principles governing the appellate jurisdiction of this court in criminal cases, when the Act of 1891 was passed, were as follows:

1. This court has no general appellate jurisdiction to re-

view on error or appeal decisions of lower Federal courts in criminal cases, and such jurisdiction must be conferred in clear and explicit language.

United States v. *More, supra.*
Ex parte Yarbrough, supra.
Cross v. *United States, supra.*

2. Appeal and writ of error being the appropriate forms of procedure provided by Congress for the mere correction of error, the appellate jurisdiction of this court for that purpose was limited to the cases in which express provision was made for appeals or writs of error.

In cases not so provided for, neither *habeas corpus* nor *certiorari* could be used to supply the place of a writ of error for the mere correction of error.

Ex parte Gordon, supra.
Ex parte Kearney, supra.
American Const. Co. v. *Jacksonville, etc., Ry. Co., supra.*

3. It would seem that *certiorari* could be issued, under R. S., Sec. 716, as an independent process, *to correct excesses of jurisdiction*, where the circumstances imperatively demanded such interposition (thus again presenting a strong analogy to *habeas corpus*).

Whitney v. *Dick, supra.*
In re Chetwood, supra.
Harris v. *Barber, supra.*

When, therefore, Congress by Section 6 of the Act of 1891 provided for the use of *certiorari* as an instrument for the mere correction of error, to have, when once issued,

exactly the same effect as an appeal or writ of error, it established an entirely new use of the writ; and the appellate jurisdiction for the correction of error in crimnial cases given to this court by that section, was an entirely new jurisdiction, and not, as argued on page 19 of the Government's brief, a reservation of an existing jurisdiction. The cases of *ex parte Gordon* and *American Const. Co.* v. *Jacksonville, etc., Ry. Co.*, above cited, leave no doubt on that question.

B. CERTIORARI UNDER THE ACT OF 1891.

In that portion of the original brief for the respondent dealing with the question of jurisdiction, the attempt was made to discuss every ground of distinction which could be suggested between the case at bar and the *Sanges* case. The Government's brief, however, seems to suggest a further ground, in the fact that this case has already been once appealed, and that the decision of which review is now sought is the decision of an appellate court. But there is no more precedent for reviewing in a criminal case a decision of an appellate court in favor of the defendant than a decision of the trial court; and at least two of the cases cited and relied on by this Court in the *Sanges* case were cases in which the defendant, having been convicted in the trial court, had secured in an appellate court an order setting aside the judgment against him and directing a new trial, and in which the Government sought, as in the present case, to obtain review in a still higher court of the decision of the first appellate court. These cases are:

People v. *Royal*, 1 Scammon (Ill.), 557.
People v. *Carnal*, 6 N. Y. 463.

The Government's brief (p. 15) refers to the fact that if, under the Act of 1879, and before the Act of 1891, a crim-

inal case was taken by writ of error from the District Court to the Circuit Court, and there was a difference of opinion in the Circuit Court, the Government could have the question certified to this Court. That procedure finds its analogy in the present law in the power of the judges of the Circuit Court of Appeals to certify to this Court, before decision, any questions on which they desire advice. There was never, before the Act of 1891, any procedure by which a decision once rendered in favor of the defendant in a criminal case, in any court of the United States, could be reviewed in a higher court, and the respondent's contention is that section 6 of the Act of 1891 cannot fairly be construed as intended to make that "serious and far-reaching innovation in criminal procedure."

The Act of 1879 is suggestive on another point. It made the allowance of the writ of error for which it provided discretionary with the circuit judge or circuit justice "on consideration of the importance and difficulty of the questions presented in the record" (20 Stat. 354). There is, therefore, nothing new in the discretionary feature of the provision for *certiorari* in the Act of 1891—no reason for regarding that feature as putting the provision in a class by itself, outside the general principle illustrated by the *Sanges* case.

On pages 15-16 of the original brief it is suggested that it cannot have been an essential ground of the decision in the *Sanges* case that the jurisdiction of this Court was there sought to be invoked by the Government *as of right*, since the Government had since 1789 had the right to invoke the jurisdiction of this Court in criminal cases, *before decision in the court below*, whenever there was a difference of opinion between the judges of the Circuit Court. No cases were there cited in support of that statement.

This omission is now supplied by reference to the follow-

ing cases, which were certified to this Court at the Government's request:

United States v. *Holmes*, 5 Wheat., 412, 415.
United States v. *Wilson*, 7 Pet., 150, 154.
United States v. *Brewster*, 7 Pet., 164, 165.
United States v. *Bailey*, 9 Pet., 238, 241.
United States v. *Bailey*, 9 Pet., 267, 271.
United States v. *Britton*, 107 U. S., 655, 660.
United States v. *Hess*, 124 U. S., 483, 485.

II.

ADDITIONAL AUTHORITIES ON THE VALIDITY OF THE VERDICT.

The second important addition to the Government's brief is the discussion on pp. 40-45 under the heading, *"As consent cannot endow a tribunal with jurisdiction, so it cannot divest it of jurisdiction that has once attached."* To this general proposition the respondent gives immediate assent. No attempt was made in the present case to agree that the court should no longer have jurisdiction. The attempt was exactly opposite—to agree that the court might proceed in a manner wholly outside its jurisdiction.

In answer to the Government's distinction between *jurisdiction* and *due process of law*, and the attempt, under the heading above quoted, to define the question of jurisdiction as applied to the present case, it is sufficient to quote the following passage from

In re Bonner, 151 U. S. 242, 256-258.

> We are unable to agree with the learned counsel, but are of the opinion that in all cases where life or liberty

is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms. There has been a great deal said and written, in many cases with embarrassing looseness of expression, as to the jurisdiction of the courts in criminal cases. From a somewhat extended examination of the authorities we will venture to state some rule applicable to all of them, by which the jurisdiction as to any particular judgment of the court in such cases may be determined. It is plain that such court has jurisdiction to render a particular judgment only when the offence charged is within the class of offences placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, *is void*. Proceeding within these limitations, its action may be erroneous, but not void.

To illustrate: In order that a court may take jurisdiction of a criminal case, the law must, in the first instance, authorize it to act upon a particular class of offences within which the one presented is embraced. Then comes the mode of the presentation of the offence to the court. That is specifically prescribed. If the offence be a felony, the accusation in the Federal court must be made by a grand jury summoned to investigate the charge of the public prosecutor against the accused. Such indictment can only be found by a specified number of the grand jury. If not found by that number, the court cannot proceed at all. If the offence be only a misdemeanor, not punishable by imprisonment in the penitentiary, *Mackin* v. *United States*, 117 U. S. 348, the accusation may be made by indictment of the

grand jury or by information of the public prosecutor. An information is a formal charge against the accused of the offence, with such particulars as to time, place, and attendant circumstances as will apprise him of the nature of the charge he is to meet, signed by the public prosecutor. When the indictment is found, or the information is filed, a warrant is issued for the arrest of the accused to be brought before the court, unless he is at the time in custody, in which case an order for that purpose is made, to the end, in either case, that he may be arraigned and plead to the indictment or information. When he is brought before the court, objections to the validity or form of the indictment or information, if made, are considered, or issue is joined upon the accusation. When issue is thus joined, *the court must proceed to trial by a jury, except in case of the accused's confession. It cannot then proceed to determine the issue in any other way.* When the jury have rendered their verdict, the court has to pronounce the proper judgment upon such verdict—and the law, in prescribing the punishment, either as to the extent, or the mode, or the place of it, should be followed.

The Government concedes (Brief, p. 43) that a trial beginning with twelve jurors and ending with ten could not be forced on the defendant against his will, because of the Sixth Amendment. But that amendment, so far as material to the present case, guarantees only a "trial by jury." If a trial without a full jury throughout is not a trial by jury under the Sixth Amendment, it is not a trial by jury under the Third Article. Either such a trial is void under the Third Article, or the defendant can be compelled to submit to it notwithstanding the Sixth Amendment.

The respondent takes this opportunity to cite, in support of the argument on page 82 of the original brief, that trial

by other than the tribunal authorized by law is only a species of arbitration, the case of

Graham v. *Bayne,* 18 How. 60,

where trial of a civil case by the court without jury, in the absence of statutory authority, was put on exactly that footing.

Respectfully submitted,

POWERS & HALL,
SAMUEL L. POWERS,
HENRY W. DUNN,
Counsel for the Respondent.

FILED
JAN 8 1909
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States

October Term, 1908. No. 668.

UNITED STATES,
Petitioner,

vs.

JOHN W. DICKINSON,
Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

SECOND SUPPLEMENTAL BRIEF FOR THE RESPONDENT.

JOSEPH CHOATE,
SAMUEL J. POWERS,
GEORGE W. LEITCH,
Counsel for the Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Supreme Court of the United States

UNITED STATES,
PETITIONER,

v.

JOHN W. DICKINSON,
RESPONDENT.

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

SECOND SUPPLEMENTAL BRIEF FOR THE RESPONDENT.

The Government's supplemental brief on the question of jurisdiction, as seen by counsel for the respondent in proof, subject to revision, lays great stress on the fact that a constitutional question is involved in this case. It would seem, however, that at least one point in connection with the question of jurisdiction here raised was settled by the *Sanges* case, if that case is authority for nothing else—namely that the presence here of a constitutional question cannot be the test of jurisdiction.

If the *Sanges* case had decided that the purpose of Congress to secure review by this Court of all decisions on constitutional questions, as expressed in Section 5 of the Act of 1891, went so far as to override the traditional finality

of decisions in favor of the defendant, it might then be contended with some force that the same innovation must have been intended in the provision for *certiorari* in Section 6, *at least so far* as that provision might become applicable to criminal cases involving constitutional questions. The decision in the *Sanges* case having been directly opposite, the bottom drops out of the argument, and the jurisdiction in the present case must be supported, if at all, on grounds having no reference to the presence of a constitutional question.

To the other arguments advanced in the Government's supplemental brief, counsel for the respondent do not deem it necessary to reply specifically, any further than has been done in the oral argument and the briefs already filed.

For another purpose, however, a few further considerations must be presented. The suggestions made from the bench during the oral argument, directing the inquiry to the broad general purposes of the Act of 1891, have since received a careful consideration which there was then no opportunity to give them. The result of this consideration is here submitted.

To determine the inferences to be drawn from the provisions of the Act of 1891, it is necessary first to inquire in what respects that Act involved the introduction of new principles.

Looking broadly at the provisions governing the appellate jurisdiction of this Court before the Act of 1891, we find that Congress evidently had in mind from the first the danger of over-crowding the docket of the Supreme Court, if the right to obtain review in that Court of the decisions of inferior courts were extended to all, or nearly all, of the cases over which the inferior courts had jurisdiction—a danger particularly to be avoided in the case of a court charged with greater responsibilities and more important

functions than were ever before entrusted to a judicial tribunal under any government. As a result the decisions of the lower Federal courts which were not reviewable by the Supreme Court (meaning, of course, in the case of decisions of the Circuit Courts, that they were not reviewable anywhere), always constituted a very considerable proportion of the total. Without attempting an accurate or complete statement of the various acts of Congress on the subject, the general line of classification may be indicated as follows:

(1) Decisions in criminal cases were not generally reviewable by this Court until provision was made in 1889 for writs of error in capital cases.

(2) Review of civil cases at common law, and of equity, admiralty and maritime cases was generally dependent on the amount in controversy. The figure set varied in different statutes, but the original standard was $2,000, and this was subsequently raised, for most cases, to $5,000.

(3) Cases involving particular classes of questions, or arising under particular laws, were from time to time made reviewable without regard to the amount involved; such, for example, as patent, copyright and trademark cases, "civil rights cases," and those in which a jurisdictional question was raised in the Circuit Court.

(4) In at least two instances the right of review was made dependent on the discretion of a court or judge. This was done in a provision relating to prize cases in the District Courts involving less than $2,000, and one relating to civil cases in the District of Columbia involving from $100 to $1,000 (R. S., Sects. 695, 706).

For summaries of the appellate jurisdiction of the Supreme Court before 1891, reference may be made to

2 Foster's Federal Practice (ed. of 1892), pp. 969-971.

Taylor's Jurisd. & Proc. of U. S. Sup. Ct. (ed. of 1905), Secs. 12, 13; pp. 21-26.

In course of time, however, the growth of the country and the increase of litigation, together with a tendency on the part of Congress to add from time to time new classes of cases to those reviewable here, resulted in the overcrowding it had always been desired to avoid. The Circuit Court of Appeals Act was the result.

Its primary object, as very clearly stated by this court in the passage quoted from

American Construction Co. v. *Jacksonville, etc., Ry. Co.*, 148 U. S., 372, 380,

on page 8 of the respondent's original brief, "was to relieve this Court of the overburden of causes and controversies" by transferring to the Circuit Court of Appeals a large part of the appellate jurisdiction of the Supreme Court.

This was not, however, the only object accomplished. The creation of a new appellate court in every circuit, and the relief afforded to this court, made it possible, first, to provide for review either in the Circuit Court of Appeals or in this Court of some decisions of which there had previously been no review at all (not because they were not of the character usually reviewable in appellate courts in common law jurisdictions, but because there had previously been no room for them); and, second, to make a re-classification of the cases reviewable in the Supreme Court.

This re-classification departed considerably from the old lines. The amount in controversy, which had originally been the principal test, was retained as such in only one provision of the Act. The tendency had constantly grown, in the legislation of Congress on this subject, to classify by

the nature and Federal importance of the questions involved, rather than by the character of the case as civil or criminal, or the amount in controversy. In accordance with this tendency the Act of 1891, in defining the appellate jurisdiction of this Court over the decisions of the Circuit and District Courts, included all cases involving a jurisdictional question, all cases of capital and infamous crimes against the United States, and all cases, civil or criminal, involving constitutional questions. When the framers of the law came to define the appellate jurisdiction of this Court over the Circuit Court of Appeals, they evidently approached the question from the same general point of view, but recognized the practical difficulty of fully attaining, by any arbitrary general definition, the desired object of selecting, out of the whole number of cases which might arise, those most demanding the attention of this court. Accordingly, after going a certain way in explicit classification, they adopted a provision which added to the cases expressly enumerated all others which this Court itself should deem exceptionally important.

In this mode of classification, Congress followed, with appropriate modifications, the precedent set by the earlier provisions above referred to, in which the appellate jurisdiction of the Supreme Court in certain cases was made dependent upon the discretion of a court or judge as to the importance of the questions raised. Compare, also, the discretionary feature of the Act of 1879 providing for review in the Circuit Courts of criminal cases from the District Courts, referred to on page 10 of the respondent's first supplemental brief, and the somewhat similar feature of the appellate jurisdiction of the Supreme Court over the decisions of State courts. (*Spies* v. *Illinois*, 123 U. S., 131.)

The objects which Congress sought to attain by the Act of 1891, as disclosed by a study of the Act itself, in com-

parison with the previously existing law, would thus appear to be the following:

1. To relieve this court from the overcrowding of its docket.

2. To provide a review *somewhere* in all cases tried in the Circuit and District courts.

3. By a new classification of the appellate jurisdiction of this court, to select for its attention more exactly than under any previous law, those cases most demanding its consideration.

Does it follow from the recognition of any of these objects that Congress must have intended, in the provision of Section 6 for *certiorari*, to make the "serious and far-reaching innovation" referred to in the *Sanges* case? The first object certainly does not suggest that conclusion. The second requires brief consideration. Did Congress intend merely to bring the Federal jurisprudence more nearly into line with the judicial systems of the States and of England, (to which it had in respect of appellate jurisdiction presented a marked contrast), by providing for review in some appellate court of all judgments and decrees of trial courts of the kinds generally reviewable under common law systems, or to go further and provide for review of a class of decisions traditionally not reviewable at all? The former conclusion is the natural one, and in the absence of a plain indication of the latter intent, almost the inevitable one. It is submitted that the reasoning which led to a unanimous decision by this court, upon this very statute, in the *Sanges* case, as well as the *authority* of that case, is convincing on this point—especially since that decision was rendered so near to the time of the passage of the Act as to make it undoubtedly easier for the Court to judge of the probable intent of Congress, if the

question was a close one, than in the present day when conditions have undergone a considerable change.

The jurisdiction in the present case must be sustained, if at all, by the discovery of a purpose peculiarly manifested by the provision for *certiorari*. The argument would be somewhat as follows: In carrying out the third of the purposes above enumerated, and defining anew the appellate jurisdiction of the Supreme Court, Congress intended to enable this Court to decide all questions particularly important from a national standpoint, or in which error, uncertainty or conflict arising from decisions in the circuits would be particularly unfortunate; but preserving the traditional finality of decisions in criminal cases in favor of the accused, would prevent the complete accomplishment of this purpose; an intent to authorize review of such decisions is therefore manifest from the general purpose of the provision for *certiorari*. The difficulty with this argument is that the provision for *certiorari* is only one of the provisions designed to secure the general purpose just above stated. The provision for direct review of constitutional questions had precisely the same object. The provision for direct review of all cases of capital or infamous crimes, while doubtless inserted partly out of consideration to the accused, recognized also the practical importance of a uniform construction of the more important criminal statutes. Yet the latter provision was expressly limited to review in behalf of the defendant, and the former is held in the *Sanges* case to be so limited. It is also declared in that case that the same limitation applies to the appellate jurisdiction of the Circuit Court of Appeals.

The question is not whether Congress might not conceivably have entertained a purpose which would go to the length involved in the argument above suggested, but whether Congress in fact manifested such a purpose in this particular Act. Looking at the Act as a whole, and at the

established judicial construction of certain of its provisions, it is clear that no such intent is manifested.

It is important to observe that the Act as originally passed gave exclusive appellate jurisdiction to this Court in all cases of infamous as well as capital crimes. It is particularly difficult to presume an affirmative intent, in a single provision of the Act, to break down the traditional limitation of review in criminal cases to decisions against the accused, when that provision, as the Act was originally passed, could never become operative upon any criminal case except a petty one, and if it ever became operative upon a petty criminal case in which a constitutional question chanced to be involved, would become so in spite of, and not because of the constitutional question.

Any distinction between the present case and cases arising under the other provisions of the Act of 1891, involves still another inconsistency. In order to infer that Congress felt the necessity for a review, under the provision for *certiorari*, of a class of decisions which form an exception under any other provision of the Act, we must assume that Congress had a confidence in the decisions of single judges of the Circuit and District Courts, rendered in the course of trial proceedings, which was not accorded to the decisions of three of the same judges sitting in a Circuit Court of Appeals and deciding questions after full argument and mature consideration.

In connection with the importance attached, in the foregoing discussion, to the provision of the Act as originally passed relating to infamous crimes, which was struck out by amendment in 1897 (29 Stat., 492), it is hardly necessary to add that if the Act as first passed did not manifest an intention to make, in any of its provisions, the innovation now in question, that innovation was not enacted into the provision for *certiorari* by the amendment of 1897.

The respondent has treated the *Sanges* case as an authority on the questions covered by the opinion, and as a starting point for the argument of the present case, without attempting any restatement of the reasoning which resulted in that decision, feeling that it would hardly be proper to occupy the time of the Court with a reargument of propositions there fully considered and decided. It is submitted, however, that apart from the effect of that case as an authority, a re-examination of the opinion will serve only to enforce anew the conclusions which the Court there announced with reference to the very Act now under consideration.

ERRATUM.

A careless error on page 10 of the respondent's first supplemental brief may here be corrected. Near the bottom of the page, "1789" should read "1802."

Respectfully submitted,

POWERS & HALL,
SAM'L L. POWERS,
HENRY W. DUNN,
Counsel for the Respondent.

UNITED STATES *v.* DICKINSON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 362. Argued January 4, 5, 1909.—Decided April 5, 1909.

The writ of certiorari cannot be granted under the act of March 3, 1891, c. 517, 26 Stat. 826, in a criminal case at the instance of the United States whatever the supposed importance of the questions involved. *United States* v. *Sanges*, 144 U. S. 310, distinguished.

The power of this court to issue the writ of certiorari under § 14 of the Judiciary Act of 1789, now § 716, Rev. Stat., is not a grant of appellate jurisdiction to review for correction of mere error.

The act of March 2, 1907, c. 2564, 34 Stat. 1246, giving an appeal to the Government in certain criminal cases cannot be extended beyond its terms, or construed so as to extend the power of certiorari under the act of March 3, 1891, c. 517, 26 Stat. 826, to bring up a criminal case for the correction of mere error at the instance of the United States.

Certiorari to review 159 Fed. Rep. 801, dismissed.

THE facts are stated in the opinion.

The Attorney General and *Mr. Asa P. French*, with whom *The Solicitor General* was on the brief, for petitioner:

This court has power under the Judiciary Act of 1789, "to

issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," and that includes the right to issue writs of certiorari in all proper cases. *In re Chetwood*, 165 U. S. 443, 462.

The writ of certiorari, under the Federal Constitution and statutes, is strictly the common law writ of that name with all its functions and attributes, so far as applicable to our system of jurisprudence.

At common law the writ might be granted at the instance of either the prosecutor or the defendant; it was always granted at the request of the king, in whose name the justice of the people was invoked. 4 Blackstone's Commentaries, 321. Certiorari lies in all judicial proceedings in which a writ of error does not lie. *Groenvelt* v. *Burwell*, 1 Ld. Raym. 454.

By anology the enforcement of the law by the people in the name of the king is the same as its enforcement by the people in the name of the United States, and there is ancient authority in support of granting this writ by this court. The part taken in these proceedings by the United States is entirely in accord with the usages and principles of the common law, as referred to in the act of 1789.

The case at bar is within the appellate jurisdiction of this court. Section 5 of the act of March 3, 1891, provides that such a case involving the construction or application of the Constitution of the United States may be brought here on appeal or writ of error.

Under a proper construction of the act of March 3, 1891, this court may take away from the final determination of any Circuit Court of Appeals, at any stage, before or after decision rendered in that court, any case involving questions of gravity and general importance, or as to which there is conflict between the decisions of state and Federal courts, or between those of Federal courts in different circuits, and indeed involving any matter of special interest to the people. *Forsyth* v. *Hammond*, 166 U. S. 506, 514, 515; *Fields* v. *United States*, 205 U. S. 296;

American Construction Co. v. *Jacksonville &c. Ry. Co.*, 148 U. S. 383, 384. This court has the same right to review a criminal case on certiorari on the application of the Government that it has to review a civil case.

Congress has power upon the establishment of an inferior tribunal, to reserve authority in this court to review all important cases, criminal as well as civil, on certiorari. *Taylor* v. *United States*, 207 U. S. 120, 127; *United States* v. *Bitty*, 208 U. S. 393, 399, 400.

While it was held in *United States* v. *Sanges*, 144 U. S. 310, 323, that § 5 of the act of March 3, 1891, was not sufficiently specific to give to the United States the right to sue out a writ of error to review a judgment of a Circuit Court sustaining a demurrer in a criminal case in which that court held certain Federal statutes to be unconstitutional, the case at bar presents a different situation under a different provision of law. The Government is now merely asking that this court shall, under the jurisdiction reserved to it by § 6 of the act, order a case of which a Circuit Court of Appeals has otherwise final jurisdiction to be brought here from such court on certiorari, and determine it in the same manner as if it were here on appeal or writ of error.

The jurisdiction of this court to review on certiorari cases within the final jurisdiction of a Circuit Court of Appeals and pending in that court extends to all cases which are of sufficient gravity and importance to make their decision by this court imperative or desirable, including a criminal case, like that at bar.

Mr. Henry W. Dunn, with whom *Mr. Samuel L. Powers* was on the brief, for respondent:

While this court, under § 716, Rev. Stat., and independently of the act of March 3, 1891, may issue writs of certiorari in proper cases, when the circumstances imperatively demand that form of interposition, to correct excesses of jurisdiction, and in the furtherance of justice, *Ex parte Chetwood*, 165 U. S. 443, this is not a proper one for the exercise of that extraor-

dinary power. The question of jurisdiction must be decided by construction of the provisions of the act of 1891. *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 380.

While any limitation in the matter of direct appeals under § 5 of the act of March 3, 1891, in respect to criminal cases must be read into the statute wholly by implication, nevertheless the right of review given by that section, so far as it relates to criminal cases, must be limited to review at the instance of the defendant, after a decision in favor of the Government. It could not be fairly inferred that Congress intended to authorize a review in a criminal case of a decision in favor of the accused. *United States* v. *Sanges*, 144 U. S. 310. It cannot be doubted that under the authority of that case, and on the same grounds, the general provision of § 6 granting appellate jurisdiction to the Circuit Court of Appeals, should be held subject to the same limitation.

The intent of Congress as expressed in the act of 1891 must be judged without any reference to the recent attempts to strengthen the arm of the Government, in certain classes of prosecutions. Such conditions have found natural expression in such recent legislation as the act of Congress which was before this court in *Taylor* v. *United States*, 207 U. S. 120, and *United States* v. *Bitty*, 208 U. S. 393.

This court has no general authority to review, on error or appeal, the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction; and when such jurisdiction is intended to be conferred, it should be done in clear and explicit language. *Cross* v. *United States*, 145 U. S. 571, 574.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Dickinson and one Foster were jointly indicted under § 5209 of the Revised Statutes of the United States, which is a part

of the National Bank Act. Foster, the principal defendant, was cashier of the South Danvers National Bank, and was charged with willfully misapplying the funds of the bank, and Dickinson was charged with aiding and abetting. Both having been convicted, Dickinson sued out a writ of error from the Circuit Court of Appeals for the First Circuit, and after argument that court held his conviction invalid by reason of the fact that the verdict against him was found by a jury of only ten men. 159 Fed. Rep. 801. On a writ of certiorari issued on petition of the United States the case was brought to this court.

It appeared in the course of the trial that one of the jurors by reason of illness was unable to sit further, whereupon the following agreement, signed by the parties, was filed of record:

"Whereas, one of the jurors impanelled to try the above-entitled indictment is unable by reason of illness to further sit therein,

"Now, therefore, we consent and agree that the said juror, to wit, Charles F. Low, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining eleven jurors with the same force and effect as if said juror had not been discharged."

The court then proceeded with the trial with the remaining eleven jurors. Subsequently, the trial being still unfinished, death occurred in the family of one of them, and another like agreement was filed of record as to him.

The trial proceeded with the remaining ten jurors, who returned a verdict of guilty, and thereupon a motion in arrest of judgment was filed as follows:

"And now, after verdict against the said John W. Dickinson, and before sentence, comes the said John W. Dickinson, by his attorneys, and moves the court here to arrest judgment herein and not pronounce the same, because of manifest errors in the record appearing, to wit: Because the said verdict against the said John W. Dickinson was found by a so-called jury consisting of ten (10) jurors only, and not by a jury of twelve (12)

jurors, as required by the Constitution and laws of the United States, and because no judgment against him, the said John W. Dickinson, can be lawfully rendered on said verdict."

This motion was overruled, and a bill of exceptions to the ruling was duly allowed on the same day, and defendant was sentenced by the court to nine years' imprisonment in the jail at Dedham.

The judgment of the Circuit Court of Appeals was—

"The judgment of the District Court and the verdict therein are set aside; and the case is remanded to that court for further proceedings in accordance with law."

Application was then made to this court for a writ of certiorari, which, because of the urgency of the Government as to the importance of the particular decision, was granted, notwithstanding the judgment of the Circuit Court of Appeals was not final.

Nevertheless, we are met at the threshold by the objection that the writ of certiorari cannot be granted under the act of 1891 in a criminal case, whatever the supposed importance of the question involved.

In our opinion it is clear that the question of jurisdiction must be decided by the proper construction of the act of March 3, 1891. That act (March 3, 1891, c. 517, 26 Stat. 826) was framed for the purpose of relieving the Supreme Court from the excessive burden imposed upon it by its increasingly crowded docket, and assigned to the Circuit Courts of Appeals thereby established a considerable part of the appellate jurisdiction formerly exercised by the Supreme Court. *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372.

Section 6 reads as follows:

"The Circuit Courts of Appeals . . . shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, . . . and the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the

jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

"And, thereupon, the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

"And exceping also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

At the time when this act was passed the only existing method by which a decision of the Supreme Court could be obtained on a question of law arising in a criminal case not capital was upon certificate of difference of opinion by the judges of the Circuit Court, under §§ 651 and 697 of the Revised Statutes. In capital cases, by the act of February 6, 1889, 25 Stat. 656, c. 113, § 6, the defendant was given the right to obtain a review in this court by writ of error. The act of 1891 superseded the existing statutory provisions as to a certificate of difference of opinion. *United States* v. *Rider*, 163 U. S. 132; *The Paquete Habana*, 175 U. S. 677.

By clause 5, appeals or writs of error from the District and

Circuit Courts direct to the Supreme Court might be taken in cases involving the construction or application of the Constitution of the United States, or where the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority was drawn in question, and in cases in which the constitution or law of a State was claimed to be in contravention of the Constitution of the United States.

The clauses as to appeals or writs of error where constitutional questions were involved made no distinction in their language between civil and criminal cases, and no distinction as to the party who was aggrieved by the decision in the court below; but in *United States* v. *Sanges*, 144 U. S. 310 (decided April 4, 1892), it was held, on great consideration, that the right of review given by that provision of § 5, so far as it related to criminal cases, must be limited to review at the instance of the defendant after a decision in favor of the Government. The decision was reached after a thorough examination of the Federal legislation as to appellate jurisdiction in criminal cases and of the authorities in England and in the United States relating to criminal appeals, in which the court finds no precedent without express statutory enactment for any review of any judgment in favor of the accused. And the case proceeded upon the grounds thus summed up in the concluding paragraph of the opinion:

"In none of the provisions of this act, defining the appellate jurisdiction, either of this court, or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States."

As we have before observed, the certiorari in this case is the certiorari provided for by the act of 1891, being in the nature of an appeal or writ of error for the mere correction of error, a new use of the writ.

Section 14 of the Judiciary Act of 1789 gave to the Supreme Court and the Circuit and District Courts "power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law," but that was not a grant to this court of appellate jurisdiction to review by certiorari for the mere correction of error any or all decisions of the lower Federal courts not otherwise reviewable.

In *United States* v. *More*, 3 Cranch, 159, 172, Mr. Chief Justice Marshall said:

"In support of the jurisdiction of the court, the attorney general has adverted to the words of the Constitution, from which he seemed to argue, that as criminal jurisdiction was exercised by the courts of the United States, under the description of 'all cases in law and equity arising under the laws of the United States,' and as the appellate jurisdiction of this court was extended to all enumerated cases, other than those which might be brought on originally, 'with such exceptions, and under such regulations, as the Congress shall make,' that the Supreme Court possessed appellate jurisdiction in criminal, as well as civil cases, over the judgments of every court, whose decisions it would review, unless there should be some exception or regulation made by Congress, which should circumscribe the jurisdiction conferred by the Constitution.

"This argument would be unanswerable, if the Supreme Court had been created by law, without describing its jurisdiction. The Constitution would then have been the only standard by which its powers could be tested, since there would be clearly no Congressional regulation or exception on the subject.

"But as the jurisdiction of the court has been described, it has been regulated by Congress, and an affirmative description of its powers must be understood as a regulation, under the Constitution, prohibiting the exercise of other powers than those described." *Ex parte Yarbrough*, 110 U. S. 651, 653;

Cross v. *United States*, 145 U. S. 571, 574. In the latter case we said:

"We have, of course, no general authority to review, on error or appeal, the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction, or those of the Supreme Court of the District of Columbia or of the Territories; and when such jurisdiction is intended to be conferred, it should be done in clear and explicit language."

The decisions to that effect are very numerous and it is quite inadmissible to hold that criminal cases cannot be reviewed here by writ of error or appeal without express statutory authority, but may be by certiorari under Revised Statutes, § 716, for the correction of any error that may have been committed by the lower courts; and our decisions are to the contrary.

In *Ex parte Gordon*, 1 Bl. 503, it was ruled that neither a writ of error, a writ of prohibition, nor certiorari, would lie from the Supreme Court to a Circuit Court of the United States in a criminal case, and that the only case in which the court was authorized even to express an opinion on the proceedings in a Circuit Court in a criminal case was where the judges of the Circuit Court were opposed in opinion upon a question arising at the trial and certified it to this court for its decision.

It is true that in the case of *Chetwood*, 165 U. S. 443, 462, we allowed the writ to bring up for review certain final orders of the Circuit Court, which interfered with causes pending in this court; and the question of the issue of the writ by this court in the exercise of an inherent general power under the Constitution did not arise. *In re Tampa Suburban R. R. Co.*, 168 U. S. 583.

And in *Whitney* v. *Dick*, 202 U. S. 132, it was said that the power of the court to issue original and independent writs of certiorari might be upheld under the authority given by § 716, citing *Ex parte Vallandigham*, 1 Wall. 243, and cases; *Ewing* v. *St. Louis*, 5 Wall. 413; *Ex parte Lange*, 18 Wall. 163; and quoting from the opinion of Mr. Justice Gray in *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, where an

application was made for mandamus and certiorari, as follows:

"Under this provision, the court might doubtless issue writs of certiorari in proper cases. But the writ of certiorari has not been issued as freely by this court as by the Court of Queen's Bench in England. *Ex parte Vallandigham*, 1 Wall. 243, 249. It was never issued to bring up from an inferior court of the United States for trial a case within the exclusive jurisdiction of a higher court. *Fowler* v. *Lindsey*, 3 Dall. 411, 413; *Patterson* v. *United States*, 2 Wheat. 221, 225, 226; *Ex parte Hitz*, 111 U. S. 766. It was used by this court as an auxiliary process only, to supply imperfections in the record of a case already before it; and not, like a writ of error, to review the judgment of an inferior court. *Barton* v. *Petit*, 7 Cranch, 288; *Ex parte Gordon*, 1 Black, 503; *United States* v. *Adams*, 9 Wall. 661; *United States* v. *Young*, 94 U. S. 258; *Luxton* v. *North River Bridge*, 147 U. S. 337, 341."

But the distinction between preventing excesses of jurisdiction and the mere correction of error is a fundamental one, and the rule remains that appeal and writ of error, being the proper forms of procedure provided for the mere correction of error, the appellate jurisdiction of this court for that purpose is limited to the cases in which express provision is made for appeals or writs of error, and that certiorari cannot be independently used to supply the place of a writ of error for the mere correction of error.

The construction of the act of 1891, must be arrived at without reference to such recent legislation as the act of Congress of March 2, 1907, c. 2564, 34 Stat. 1246, providing for writs of error in certain instances in criminal cases, in respect of which this court held in *United States* v. *Keitel*, 211 U. S. 398, "that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor

of the United States is limited by the very terms of the statute to authority to reëxamine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

So far as that statute is an innovation in criminal jurisdiction in certain classes of prosecutions, it cannot be extended beyond its terms.

Writ of certiorari dismissed.

MR. JUSTICE MOODY took no part in the consideration and disposition of this case.